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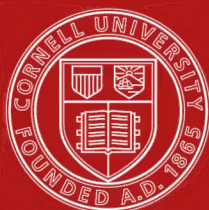
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I have reason to believe that your compilation will greatly abridge this labor, and that you are therefore entitled to the thanks and patronage of the profession.

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LAW OF EVIDENCE,

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With unfeigned gratitude to the profession for the favor with which they have received the previous volume, I respectfully commend this to their candid consideration.

THE COMPILER.

New-York, September, 1856.

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INDEX TO REPORTS AND REPORTERS

COMPRISED IN THIS VOLUME,

ALPHABETICALLY ARRANGED,

WITH

ABBREVIATIONS AND REFERENCES.

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS |
|-----------------------------|--------------------------------------|------------------|
| Abbott,..... | Abbott, | New-York. |
| Ada,..... | Adams,..... | New-Hampshire. |
| Add. Eccl.,..... | Addams,..... | English. |
| Addis,..... | Addison,..... | Pennsylvania. |
| A. & E.,..... | Adolphus & Ellis,..... | English. |
| Aik,..... | Aiken,..... | Vermont. |
| Ala.,..... | Alabama,..... | Alabama. |
| An.,..... | Annual,..... | Louisiana. |
| Anthon,..... | Anthon, | New-York. |
| Anth. N. P. C.,..... | Anthon's Nisi Prius Cases,..... | " |
| App.,..... | Appleton,..... | Maine. |
| Arch. Cr. Pl. & Ev.,..... | Archbold Crim. Pleadings & Ev.,..... | Amer. Edition. |
| Ashm.,..... | Ashmead,..... | Pennsylvania. |
| Atk.,..... | Atkyns,..... | English. |
| | | |
| B. & A., and B. & Ad.,..... | Barnwall & Adolphus,..... | English. |
| B. & C.,..... | Barnwall & Cresswell,..... | " |
| Bacon Abr.,..... | Bacon's Abridgment,..... | " |
| Bail,..... | Bailey, | South Carolina. |
| Bail. Ch.,..... | Bailey, (Chancery,)..... | " |
| Baldw.,..... | Baldwin,..... | United States. |
| Barb.,..... | Barbour,..... | New-York. |
| Barb. Sup. Ct.,..... | Barbour, (Law,)..... | " |
| Barb. Ch. R.,..... | Barbour, (Chancery,)..... | " |
| Barn. & Adol.,..... | Barnwall & Adolphus,..... | English. |
| Barn. & Cress.,..... | Barnwall & Cresswell,..... | " |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|------------------------------|---------------------------------|-------------------|
| Barr,..... | Barr,..... | Pennsylvania. |
| Bay,..... | Bay,..... | South Carolina. |
| Beav.,..... | Beavan,..... | English. |
| Best Ev.,..... | Best's Evidence,..... | " |
| Bibb,..... | Bibb,..... | Kentucky. |
| Bing,..... | Bingham,..... | English. |
| Bing. N. C.,..... | Bingham's New Cases,..... | " |
| Binn.,..... | Binney,..... | Pennsylvania. |
| Bla.,..... | Bland, (Chancery,)..... | Maryland. |
| Blackf.,..... | Blackford,..... | Indiana. |
| Black. Comm.,..... | Blackstone's Commentaries,..... | English. |
| Blatchford & Howland,... | Blatchford & Howland,..... | United States. |
| Blatch. Ct. Ct.,..... | Blatchford,..... | " |
| B. Mon.,..... | B. Monroe,..... | Kentucky. |
| Bradf.,..... | Bradford,..... | Iowa. |
| Bran.,..... | Branch,..... | Florida. |
| Brayt.,..... | Brayton,..... | Vermont. |
| Breese,..... | Breese,..... | Illinois. |
| Brev.,..... | Brevard,..... | South Carolina. |
| Bright,..... | Brightly,..... | Pennsylvania. |
| Brock. C. C.,..... | Brockenbrough,..... | United States. |
| Brod. & Bing,..... | Broderip & Bingham,..... | English. |
| Bull N. P.,..... | Bull's Nisi Prius,..... | " |
| Bur.,..... | Burrett,..... | Wisconsin. |
| Burr,..... | Burrow,..... | English. |
| Caines,..... | Caines,..... | New-York. |
| Cal.,..... | California,..... | California. |
| Call,..... | Call,..... | Virginia. |
| C. & K.,..... | Carrington & Kirwan,..... | English. |
| Car. & K., and Car. & Kirw., | Carrington & Kirwan,..... | " |
| Camp.,..... | Campbell,..... | " |
| C. & F.,..... | Clark & Finnely,..... | " |
| C. & P.,..... | Carrington & Payne,..... | " |
| Car. & M.,..... | Carrington & Marshman,..... | " |
| Carr. & Payne,..... | Carrington & Payne,..... | " |
| Carter, (Ind.),..... | Carter,..... | Indiana. |
| C. C.,..... | Civil Code of 1825,..... | Louisiana. |
| Chand. (Wis.)..... | Chandler,..... | Wisconsin. |
| Charlt.,..... | R. M. Charlton,..... | Georgia. |
| Cheves,..... | Cheves,..... | South Carolina. |
| Chip.,..... | D. Chipman,..... | Vermont. |
| N. Chip.,..... | N. Chipman,..... | " |
| Chitty,..... | Chitty,..... | English. |
| Chit. Cr. L.,..... | Chitty's Criminal Law,..... | Amer. Edition. |
| Cobb,..... | Cobb,..... | Georgia. |
| Cocke,..... | Cocke,..... | Alabama. |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|----------------------------|----------------------------------|-------------------|
| Comst.,..... | Comstock,..... | New-York. |
| Cond. Rep.,..... | Condensed Reports,..... | English. |
| Conn.,..... | Connecticut,..... | Connecticut. |
| Cooke,..... | Cooke,..... | Tennessee. |
| Cowen,..... | Cowen,..... | New-York. |
| Cowp.,..... | Cowper,..... | English. |
| Coxe,..... | Coxe,..... | New-Jersey. |
| C., M. & R.,..... | Crompton, Meeson & Roscoe,... | English. |
| C. & N.,..... | Cameron & Norwood,..... | North Carolina. |
| C. P.,..... | Code of Practice,..... | Louisiana. |
| Crabbe,..... | Crabbe,..... | United States. |
| Cranch,..... | Cranch,..... | " |
| Cr. & J.,..... | Crompton & Jervis,..... | English. |
| Curteis,..... | Curteis,..... | " |
| Curtis Ct. Ct.,..... | Curtis' Circuit Court,..... | United States. |
| Cush.,..... | Cushing,..... | Massachusetts. |
| Dall.,..... | Dallas,..... | U. S. & Penn. |
| Dana,..... | Dana,..... | Kentucky. |
| Davies,..... | Davies,..... | United States. |
| Day,..... | Day,..... | Connecticut. |
| Dean,..... | Dean,..... | Vermont. |
| Dean's Med. Juris.,..... | Dean's Medical Jurisprudence,... | New-York. |
| Denio,..... | Denio,..... | " |
| Dev.,..... | Devereux, (Law,)..... | North Carolina. |
| Dev., (Eq.),..... | Devereux, (Equity,)..... | " |
| Dev. & Bat.,..... | Devereaux & Battle,..... | " |
| Doug.,..... | Douglass,..... | Michigan. |
| Dow & Ry.,..... | Dowling & Ryland,..... | English. |
| Dud., (Geo.),..... | Dudley,..... | Georgia. |
| Dud., (S. C.),..... | Dudley, Law and Equity,..... | South Carolina. |
| Duer,..... | Duer,..... | New-York. |
| Dur.,..... | Durfee,..... | Rhode Island. |
| East,..... | East,..... | English. |
| East, (P. C.),..... | East's Pleas of the Crown,..... | " |
| Edw., (Ch.),..... | Edwards, (Chancery,)..... | New-York. |
| Eng.,..... | English,..... | Arkansas. |
| Eng., (Ark.),..... | English,..... | " |
| Eng. Law and Eq. Rep.,.... | English Law and Equity,..... | Amer. Edition. |
| Esp.,..... | Espinasse,..... | English. |
| Ev. Pothier,..... | Evans' Pothier,..... | Amer. Edition. |
| Fairf.,..... | Fairfield,..... | Maine. |
| Florida,..... | Florida,..... | Florida. |
| Fos.,..... | Foster,..... | English. |
| Foster, (N. H.),..... | Foster,..... | New-Hampshire. |
| Freem., (Miss.),..... | Freeman, (Chancery,)..... | Mississippi. |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|------------------------|--------------------------------------|-------------------|
| Gallis,..... | Gallison,..... | United States. |
| Geo.,..... | Georgia,..... | Georgia. |
| Gill,..... | Gill,..... | Maryland. |
| Gilb. Ev.,..... | Gilbert's Evidence,..... | English. |
| Gill & Johns,..... | Gill & Johnson,..... | Maryland. |
| Gilm.,..... | Gilman,..... | Illinois. |
| Gilmer,..... | Gilmer,..... | Virginia. |
| Gilpin,..... | Gilpin,..... | United States. |
| Gow, N. P. C.,..... | Gow's Nisi Prius Cases,..... | English. |
| Gratt.,..... | Grattan,..... | Virginia. |
| Gray,..... | Gray,..... | Massachusetts. |
| Green, (Ch.),..... | Green's Chancery,..... | New-Jersey. |
| Greene, (Iowa),..... | Greene,..... | Iowa. |
| Greene,..... | Greene,..... | New-Jersey. |
| Greenleaf,..... | Greenleaf,..... | Maine. |
| Gresley Ev.,..... | Gresley's Evidence,..... | Amer. Edition. |
| Hagg. C. R.,..... | Haggard, Consistory Rep.,..... | English. |
| Hagg. Eccl.,..... | Haggard,..... | " |
| Hale, (P. C.),..... | Hale's Pleas of the Crown,..... | " |
| Hale,..... | Hale,..... | " |
| Hall,..... | Hall,..... | New-York. |
| Halst.,..... | Halsted,..... | New-Jersey. |
| Ham.,..... | Hammond,..... | Ohio. |
| Hard.,..... | Hardin,..... | Kentucky. |
| Harp.,..... | Harper, (Law),..... | South Carolina. |
| Harp, (Eq.),..... | Harper, (Equity),..... | " |
| Har. & Gill,..... | Harris & Gill,..... | Maryland. |
| H. & H.'s Stat.,..... | Howard & Hutchinson's Statutes,..... | Mississippi. |
| Har. & J.,..... | Harris & Johnson,..... | Maryland. |
| Har. & M'Hen.,..... | Harris & McHenry,..... | " |
| H. & M.,..... | Henning & Munford,..... | Virginia. |
| Harr.,..... | Harrison,..... | New-Jersey. |
| Harring, (Mich.),..... | Harrington,..... | Michigan. |
| Harringt.,..... | Harrington,..... | Delaware. |
| Hawks,..... | Hawks,..... | North Carolina |
| Hayw.,..... | Haywood,..... | " |
| Heyw.,..... | Heywood,..... | Tennessee. |
| Hill,..... | Hill,..... | New-York. |
| Hill, (S. C.),..... | Hill,..... | South Carolina. |
| Ho. St. Tr.,..... | Honell's State Trials,..... | English. |
| Hoff.,..... | Hoffman,..... | New-York. |
| Holt,..... | Holt,..... | English. |
| Hopk.,..... | Hopkins,..... | New-York. |
| How. Pr.,..... | Howard's Practice,..... | " |
| How, (Miss.),..... | Howard,..... | Mississippi. |
| How., (U. S.),..... | Howard,..... | United States. |
| Humph.,..... | Humphrey,..... | Tennessee. |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|-----------------------|------------------------------------|-------------------|
| Ill., | Illinois, | Illinois. |
| Ind., | Indiana, | Indiana. |
| Iowa, (Greene,)..... | Greene, | Iowa. |
| Ired., | Iredell, | North Carolina. |
| Ired., (Eq.), | Iredell, (Equity,)..... | " |
| Johns., | Johnson's Reports,..... | New-York. |
| Johns. Cas., | Johnson's Cases, | " |
| Johns. Ch., | Johnson's Chancery, | " |
| Keb., | Keble, | English. |
| Kel., | Sir John Kelyng, | " |
| Kelly, | Kelly, | Georgia. |
| Kernan, | Kernan, | New-York. |
| Kirby, | Kirby, | Connecticut. |
| L. & Lou., | Louisiana Annual, | Louisiana. |
| Law Rep., | Law Reporter, | Massachusetts. |
| Leach, | Leach, | English. |
| Ld. Raym., | Lord Raymond, | " |
| Leigh, | Leigh, | Virginia. |
| Lew. C. C., | Lewin's Crown Cases, | English. |
| Litt., | Littell, | Kentucky. |
| Litt. Sel. Ca., | Littell's Select Cases, | " |
| M. and Martin, | Martin, | Louisiana. |
| Maine, | Maine, | Maine. |
| Maine, (Heath,)..... | Heath, | " |
| Maine, (Red,)..... | Redington, | " |
| Maine, (Shep,)..... | Shepley, | " |
| Mann., (Mich,)..... | Manning, | Michigan. |
| Mann. & Ryl., | Manning & Ryland, | English. |
| Mart., (N. C,)..... | Martin, | North Carolina. |
| Mason, | Mason, | United States. |
| Mass., | Massachusetts, | Massachusetts. |
| A. K. Marsh., | A. K. Marshall, | Kentucky. |
| J. J. Marsh., | J. J. Marshall, | " |
| McLean, | McLean, | United States. |
| McCord, | McCord, | South Carolina. |
| McCl. & Y., | McClelland & Younge, | English. |
| McMullan, | McMullan, | South Carolina. |
| McNally's Ev., | Macnally's Evidence, | Irish. |
| Md., | Maryland, | Maryland. |
| Md. Ch. Decis., | Maryland Chancery Decisions, | " |
| Met., | Metcalf, | Massachusetts. |
| Meigs, | Meigs, | Tennessee. |
| Mich., (Gibbs,)..... | Gibbs, | Michigan. |
| Minor, | Minor, | Alabama. |
| Mis., | Missouri, | Missouri. |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|-----------------------------|-----------------------------|-------------------|
| Mis. (Bennett), | Bennett, | Missouri. |
| Miss., | Mississippi, | Mississippi. |
| Miss. (Cush.), | Cushman, | " |
| Monroe, | Monroe, | Kentucky. |
| B. Mon., | B. Monroe, | " |
| Moo. C. B., | Moody, | English. |
| Moo. (C. C.), | Moody's Crown Cases, | " |
| Moo. & R., | Moody & Robinson, | " |
| Mo. & P., | Moore & Payne, | " |
| Moore, | Moore, | " |
| Mood. & Malk., | Moody & Malkin, | " |
| Morris, | Morris, | Iowa. |
| M. & S., | Maule & Selwin, | English. |
| M. & W., | Meeson & Welsby, | " |
| Munf., | Munford, | Virginia. |
| Murph., | Murphy, | North Carolina. |
| Myl. & Cr., | Mylne & Craig, | English. |
| N. C., | North Carolina, | North Carolina. |
| N. H., | New-Hampshire, | New-Hampshire. |
| N. J., | New-Jersey, | New-Jersey. |
| N. S., | Martin's New Series, | Louisiana. |
| N. & M., and Nott & McCord, | Nott & McCord, | South Carolina. |
| O. C., | Old Code, or Code of 1808, | Louisiana. |
| Ohio, | Ohio, | Ohio. |
| Overt, | Overton, | Tennessee. |
| Paige, | Paige, (Chancery), | New-York. |
| Paine, | Paine, | United States. |
| Park on Ins., | Park on Insurance, | English. |
| Parker's Cr., | Parker's Criminal Cases, | New-York. |
| Parsons, | Parsons, | Pennsylvania. |
| Peake Add. Cas., | Peake's Additional Cases, | English. |
| Peake N. P. Cas., | Peake's Nisi Prius, | " |
| Peck, | Peck, | Tennessee. |
| Peck, | Peck, | Illinois. |
| Penn. Law Jour., | Pennsylvania Law Journal, | Pennsylvania. |
| Penn. and Pennsylv., | Pennsylvania, | " |
| Penn. State R., | Pennsylvania State Reports, | " |
| Penning, | Pennington, | New-Jersey. |
| Peters, | Peters, | United States. |
| Pet. C. C., | Peters' Circuit Court, | " |
| Phil. (Ch.), | Phillip's Chancery, | English. |
| Phil. Ev., | Phillips' Evidence, | Amer. Edition. |
| Pick., | Pickering, | Massachusetts. |
| Pike, | Pike, | Arkansas. |
| Port., | Porter, | Alabama. |
| Port., | Porter, | Indiana. |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|-----------------------------|-------------------------------|-------------------|
| Q. B., | Queen's Bench Reports, | English. |
| R. and Robinson, | Robinson, | Louisiana. |
| Rand., | Randolph, | Virginia. |
| Rand., | Randolph, | Mississippi. |
| Rawle, | Rawle, | Pennsylvania. |
| Ld. Raym., | Raymond, Lord, | English. |
| Red., | Redington, | Maine. |
| Rep. Con. Ct., | Constitutional Court Reports, | South Carolina. |
| Rice, | Rice, | " |
| Rich., | Richardson, (Law,) | " |
| Rich., (Eq.,) | Richardson, (Equity,) | " |
| R. L., | Rhode Island, | Rhode Island. |
| Riley, | Riley, | South Carolina. |
| Rob., | Robards, | Alabama. |
| Rob. (Va.,) | Robinson, | Virginia. |
| Rog. Rec., | Rogers' City Hall Recorder, | New-York. |
| Root, | Root, | Connecticut. |
| Ros. Cr. Ev., | Roscoe's Criminal Evidence, | Amer. Edition. |
| Russ., | Russell, | English. |
| Russ. on Cr., | Russell on Crimes, | Amer. Edition. |
| Russ. & Ry., | Russell & Ryan's Crown Cases, | English. |
| Ry. & Mo., | Ryan & Moody, | " |
| Sandf., | Sandford, | New-York. |
| Sandf. Ch. R., | Sandford, (Chancery,) | " |
| Sandf. Sup. Ct., | Sandford, (Law,) | " |
| Saund., | Saunders, | English. |
| Scam., | Scammon, | Illinois. |
| Seld., | Selden, | New-York. |
| Selden, (N. Y.,) | Selden, | " |
| S. & R., and Serg. & Rawle, | Sergeant & Rawle, | Pennsylvania. |
| Shaw, | Shaw, | Vermont. |
| Shep., | Sheppard, | Alabama. |
| Shep. & Shepl., | Shepley, | Maine. |
| S. & M., | Smaedes & Marshall, | Mississippi. |
| Sim., | Simons, | English. |
| Slade, | Slade, | Vermont. |
| Smith, | Smith, | Indiana. |
| Smith, | Smith, | New-York. |
| Smith's C. P. R., | Smith's Common Pleas Reports, | " |
| South., | Southard, | New-Jersey. |
| Speers, | Speers, | South Carolina. |
| Spencer, | Spencer, | New-Jersey. |
| Stark., | Starkie's Nisi Prius, | English. |
| Stark. Ev., | Starkie's Evidence, | Amer. Edition. |
| Stew., | Stewart, | Alabama. |
| Stew. & Port., | Stewart & Porter, | " |

| ABBREVIATIONS. | REPORTS OR REPORTERS. | STATES OR COURTS. |
|----------------------------|--------------------------------------|-------------------|
| Stra.,..... | Strange,..... | English. |
| Strobh.,..... | Strobhart, (Law,)..... | South Carolina. |
| Strobh., (Eq.),..... | Strobhart, (Equity,)..... | " |
| Story,..... | Story,..... | United States. |
| Sumner,..... | Sumner,..... | " |
| Swan, (Tenn.),..... | Swan,..... | Tennessee. |
| Swanst.,..... | Swanston,..... | English. |
| Tam,..... | Tamlyn,..... | English. |
| Taunt.,..... | Taunton,..... | " |
| Tayl.,..... | Taylor,..... | North Carolina. |
| Taylor's Med. Juris.,..... | Taylor's Medical Jurisprudence,..... | English. |
| Tenn.,..... | Tenn.,..... | Tennessee. |
| Texas,..... | Texas,..... | Texas. |
| Tha. Crim. Cas.,..... | Thacher's Criminal Cases,..... | Massachusetts. |
| T. R.,..... | Term Reports,..... | English. |
| Tyler,..... | Tyler,..... | Vermont. |
| Tyr. & G.,..... | Tyrwhitt & Granger,..... | English. |
| Ves.,..... | Vesey,..... | English. |
| Verm. and Vt.,..... | Vermont,..... | Vermont. |
| Virg. Cas.,..... | Virginia Cases,..... | Virginia. |
| Walk, (Mich.),..... | Walker, Chancery,..... | Michigan. |
| Walk, (Miss.),..... | Walker,..... | Mississippi. |
| Wall, Jun'r,..... | J. W. Wallace,..... | United States. |
| Ware,..... | Ware,..... | " |
| Wash.,..... | Washington,..... | Virginia. |
| Wash. C. C.,..... | Washington Circuit Court,..... | United States. |
| Washb.,..... | Washburn,..... | Vermont. |
| Watts,..... | Watts,..... | Pennsylvania. |
| Watts & Serg.,..... | Watts & Sergeant,..... | " |
| Web. Tr.,..... | Webster's Trial,..... | Massachusetts. |
| Welsb., H. & G.,..... | Welsby, Hurlstone & Gordon,..... | English. |
| Wend.,..... | Wendell,..... | New-York. |
| Whart.,..... | Wharton,..... | Pennsylvania. |
| Wheat.,..... | Wheaton,..... | United States. |
| Wheel C. C.,..... | Wheeler's Criminal Cases,..... | New-York. |
| Wills on Cirm. Ev.,..... | Wills on Circumstantial Evid.,..... | Pennsylvania. |
| Wis.,..... | Wisconsin,..... | Wisconsin. |
| W. & M.,..... | Woodbury & Minot,..... | United States. |
| Wright,..... | Wright,..... | Ohio. |
| Yeates,..... | Yeates,..... | Pennsylvania. |
| Yerg.,..... | Yerger,..... | Tennessee. |
| Y. & Coll.,..... | Younge & Collyer,..... | English. |
| Younge & Jervis,..... | Younge & Jervis,..... | " |
| Zab.,..... | Zabriskie,..... | New-Jersey. |

LAW OF EVIDENCE.

ESTOPPEL.

- (a.) *By Deed, Agreement, etc.*
 - (b.) *By other Specialty.*
 - (c.) *By Parol, or In Pais.*
 - (d.) *As Affecting a Tenant.*
 - (e.) *Pleading and Proof of an Estoppel.*
 - (f.) *General Principles of Estoppel.*
-

(a.) *By Deed, Agreement, etc.*

1. One who claims title to land under a conveyance from another, is bound by recitals contained in a deed of the same premises under which said grantor held his title. *Chautauque County Bank v. Risley*, 4 Denio, 480.

2. Where the defendant claimed title under A., who claimed to hold the premises by virtue of a conveyance from a receiver appointed by the Court of Chancery, which conveyance recited a decree of that court, setting aside, as fraudulent, a conveyance executed by a former owner of the premises, the defendant cannot set up the conveyance so declared fraudulent, as a valid title. *Ib.*

3. Where two persons purchase jointly from the same vendor, and enter into possession of a tract of land as tenants in common, and, after a common possession of several years, execute an agreement under their hands and seals, in which they acknowledge that they hold the land as tenants in

common, it cannot be permitted to either of them, or to any other person claiming under either of them, until the rights thereby acknowledged shall be divested or changed, to set that possession up as hostile to the title of his co-tenant. And in such case, if one of the tenants in common convey by deed the whole land to another person, and recite in the deed that he, the vendor, had title to the whole, and the purchaser is ignorant of the tenancy in common, it will not prevent the rule of law from attaching. The estoppel applies to the purchaser by reason of his privity with and under his vendor, not because of personal ill faith. *Ross v. Durham*, 4 Dev. & Bat. 54.

4. A tenant in common, having a mortgage on the part of his co-tenant, joined with him in a conveyance of the whole land with warranty of title, and that it was free from all encumbrances, and without excepting the mortgage or disclosing it to the purchaser. Held, that he was estopped by such deed from setting up a claim under the mortgage. *Durham v. Alden*, 2 App. 228.

5. In ejectment, the lessors of the plaintiff having deduced their title from V., the defendant offered the recital in a deed from one of the lessors to show the title out of them. Held admissible as affecting the title of all; for, say the court, he could not be called as a witness, and they have a community of interest. *Brandt, ex dem. Van Corlandt v. Klein*, 17 Johns. 335.

6. A recital in an act of sale from A. to B., shall not bind another who claims the property sold under A. by a previous sale, from him. *Delahoussaye v. Delahoussaye*, 7 N. S. 199.

7. A person is estopped for alleging the falsity of what he has admitted by deed; but the estoppel cannot be extended beyond the exact terms of the admission. *Campbell v. Knight*, 11 Shep. 332.

8. A recital, when used, must be taken altogether, and, therefore, if a patent be recited in one part as having existed, and another part shows it to have been surrendered, the recital will prove the fact of the surrender of the patent, as well as its former existence. *Hoyatt v. Phifer*, 4 Dev. 274.

9. Whether a man's covenant or deed, delivered and re

maining as an escrow, can be used against him as a confession of the facts cited in it. *Quere?* *Lansing v. Gaine*, 2 Johns. 300.

10. These recitals, however, are not evidence against strangers. *Morris' Lessee v. Van Deren*, 1 Dall. 64.

11. The recital in a patent of a release to the patentee by a former tenant in common, is not evidence of the existence of such release against one who has agreed to purchase from the patentee, in an action to compel payment of the purchase money. *Smith v. Webster*, 2 Watts, 478.

12. The state is not estopped by recitals in its own grants or patents, for they are presumed to be made upon the suggestion of the grantee. *Carver v. Jackson*, *ex dem. Astor*, 4 Peters, 87.

13. But the state, like every other party, is bound by recitals in deeds of others, under which it claims. *Ib.*

14. Part only of several tenants in common convey their shares of the land to A., who makes B. a deed of the whole estate; and B. disseises the co-tenants and conveys the whole to C., who preserves the disseisin; and the co-tenants then convey their shares to D., who brings a writ of entry against C. C. is not estopped by the deed to A. to claim title by disseisin. *Parker v. Locks and Canals*, 3 Met. 91.

15. A. built a dam, overflowing the lands of C. He then sold to B., and subsequently acquired a title to the lands overflowed. Held, that a deed of warranty would not pass the right to overflow the lands as against C., but that A., having subsequently acquired the title, the right did pass as against him, and he was estopped by his previous deed. *Jarnigan v. Mairs*, 1 Humph. 473.

16. The grantee is not estopped by recital in the deed from giving the truth in evidence to support it, if the other party goes behind the deed to defeat it. *Crosby v. Chase*, 5 Shep. 369.

17. A party cannot claim to defeat a deed as a conveyance, and at the same time to support it as estopping the grantee to deny the recitals therein. *Ib.*

18. In the United States, the courts require no higher proof than the recital itself, though the recited deed and the

subscribing witness be both in court. This has been expressly held, not only by the Supreme Court of the United States, but by several of the state courts, not only as against the party reciting, but against all claim under him, as privies in blood, privies in estate or privies in law. *Carver v. Jackson, ex dem. Astor*, 4 Peters, 1, 82-3.

19. Where parties go into possession of premises, claiming title thereto under a conveyance to a particular grantee, they cannot set up an outstanding title in a stranger, to defeat a person who claims the premises under the same title as themselves, but by a prior right which overreaches their claim. *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528.

20. If a grantor who has no interest, or only a defeasible interest in the premises granted, conveys the same, with warranty, and afterwards claims an absolute title to the property, such title immediately becomes vested in the grantee, or his heirs or assigns, by estoppel; and such estoppel binds the heirs and assigns of the warrantor, so far as the latter acquired such subsequent title, and all persons claiming under him in the post. *Ib.*

21. A conveyance without warranty works no estoppel to the grantor who afterwards acquires title. *Kinsman v. Loomis*, 11 Ohio, 475.

22. By receiving a second deed of warranty from the same grantor of the same premises, the grantee is not estopped from asserting that his title passed by the first deed. *Thompson v. Thompson*, 1 App. 235.

23. The grantor in a deed-poll, and all who claim title under the deed, are bound by recitals in the deed, but are not precluded from showing that a deed so recited is defective and void. *Blake v. Tucker*, 12 Vt. 39.

24. In ejectment for dower, brought against a grantee of the husband by a quit-claim deed, or against one holding under such grantee, the defendant is not estopped from showing that the husband was not seised of such an estate in the premises as to entitle his widow to dower. *Sharm v. Kingman*, 1 Comst. 242.

25. The cases of *Sherwood v. Vanderburgh*, 2 Hill, 303; *Bowne v. Potter*, 17 Wend. 161, and other similar cases in

the Supreme Court, considered, and in this respect overruled. *Sharm v. Kingman*, 1 Comst. 242.

26. It seems that an outstanding *mortgage* cannot be proved (like an *absolute deed*) by a recital in another deed, even as against the party making such recital; for it is defeasible, and if produced, might contain the evidence of its being satisfied. *Jackson, ex dem. Randall v. Davis*, 18 Johns. 7.

27. Where an administrator's deed of land warranted the title, "excepting only the widow's right of dower," it was held, that the purchaser was not estopped to deny the marriage of the intestate to the alleged widow, nor the legitimacy of his children, in a suit by them to recover the land. *Stevenson's Heirs v. McKeary*, 12 S. & M. 9.

28. The consideration acknowledged to have been received on the face of a deed or conveyance does not estop the grantor to show, in an action for the purchase money, that the consideration has not been paid. *Taggart v. Stanbery*, 2 McLean, 543.

29. But, so far as regards the effect of the deed, the consideration named cannot be controverted. *Ib.*

30. Where an old deed, under which the plaintiff claimed, recited a North Carolina grant of specified date, and there was proof that the public records of North Carolina, for that year, were lost, held, that this was insufficient, as against third persons, to raise the presumption of a grant. *Sims v. Meacham*, 2 Bail. 101.

31. A party made a lease of premises to which he had then no title, but afterwards, the true owner leased them to one, who leased them to the first lessor. Held, that these subsequent leases operated by estoppel to confirm the first. *M'Kenzie v. Lexington*, 4 Dana, 129.

32. The husband of a woman entitled to a contingent remainder in slaves, before the contingency happened, conveyed this interest by deed. Held, that this deed was an estoppel as to the husband; and when the contingency afterwards happened, by which the interest vested in the wife, such interest passed to the grantee. *Fortescue v. Satterthwaite*, 1 Ired. 566.

33. Where a conveyance was made by husband and wife, and possession taken under their deed, of land claimed by the wife, though the deed be ineffectual, from defect in the acknowledgment, to pass the title of the wife, the grantees in the deed are estopped to assert an outstanding title in a third person, in a contest with the heirs of the wife, after the death of the husband. *Gill v. Fauntleroy*, 8 B. Mon. 177.

34. Persons entering into possession of lands under the defendant in a judgment, subsequent to the issuing of an execution thereon, are bound to yield up the possession to the purchaser under such execution, unless they can show a better right in themselves, or establish the fact that the judgment was invalid as against them. *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528.

35. One is not estopped from setting up a title by disseisin in a lot of land extending beyond the thread of the river, acquired subsequently to his taking a deed bounding him by the river. *Kinsell v. Daggett*, 2 Fairf. 309.

36. A vendee is estopped from denying his vendor's title, although the deed under which the latter claims is irregularly admitted to registration. *Rochell v. Benson*, 1 Meigs, 3.

37. Where a lease for years is made by indenture, the lessee is estopped only during the term to deny the title of the lessor. *Carpenter v. Thompson*, 3 N. H. 204.

38. One who enters on land, under a conveyance from the ancestor voidable by reason of his incapacity, is estopped to deny the title of the heir. *Wall v. Hill*, 1 B. Mon. 290.

39. A., paying quit-rent on land, charged therewith in a deed to B., which deed conveys another parcel, is not estopped thereby to show his disseisin of B. as to the other parcel. *Tyler v. Hammond*, 11 Pick. 193.

40. If the principal, in a letter of attorney under seal, gives it a false anterior date, for the purpose of legalizing prior acts of the attorney, he is estopped to aver that it was in fact executed at a subsequent period. *Milliken v. Coombs*, 1 Greenleaf, 343.

41. A *feme sole* claimed certain land by virtue of a loca-

tion thereof, made to her by the proprietors; and after her intermarriage with A., he entered upon the land, under the location, and continued in possession thereof, after her decease, as tenant by the courtesy. Her heirs conveyed their reversionary interest to B., who sued A. in an action of waste. Held, that A. could not defeat the action by showing that the location of the land was so defective that it would not bar the proprietors, nor persons claiming under them; but that he was estopped to deny the title under which he entered. *Morgan v. Larned*, 10 Met. 50.

42. A defendant in ejectment was evicted, and at the same time became tenant to the plaintiff or his vendee. At the expiration of the term, he refused to surrender; and, a new ejectment being brought, he relied upon adverse possession, contending that the former judgment did not include the land, and that he was induced by fraud to take the lease. Held, that if there was no fraud, he was bound by it, and if there was fraud, which would vitiate the lease, before he could avoid it for that reason, he must restore the possession. *Ball v. Lively*, 4 Dana, 369.

43. Where one seised of land by indefeasible title takes a mortgage thereof to himself, with warranty, and dies, whereby the mortgagor becomes entitled to the same land as heir, he is not estopped to assert his title as heir, against the administrator, in an action upon the mortgage. *Harding v. Springer*, 2 Shep. 407.

44. If one, having no title to land, conveys the same, with warranty, by a deed which is duly recorded, and he afterwards acquires a title, and conveys to a stranger, the second grantee is estopped to aver that the grantor was not seised at the time of his conveyance to the first grantee. *White v. Patten*, 24 Pick. 324.

45. Where P. conveyed to N. certain land, described as "being the same premises mentioned in a mortgage deed" of T. to P.; and N. brought a writ of entry against T., as assignee of P., declaring upon said conveyance from T. to P., as a mortgagee, and obtained judgment; it was held, that N. was not estopped to say that said conveyance was not a mortgage, in an action brought by P. against N., for not

entering up judgment against T., as upon a mortgage. *Porter v. Nelson*, 4 N. H. 130.

46. A grantor is not estopped to say that debts due the grantee are paid by a deed, because the deed acknowledges the receipt of a consideration. *Buffum v. Green*, 5 N. H. 71.

47. A party is not estopped by a deed executed by him, if the whole truth of the case appears in the recitals. *Den v. Camp*, 4 Harr. 148.

48. If one has a special interest in property, which he, by deed, duly executed, releases and discharges, he will, after that time, be estopped from setting up that interest. *Walworth v. Readsboro*, 24 Vt. (1 Deane,) 252.

49. A purchaser from a person who has previously conveyed the estate to a trustee, by deed duly recorded, is estopped, *at law*, from impugning, on the ground of fraud, a deed regularly executed by the trustee to a purchaser from such trustee. *Taylor v. King*, 6 Munf. 358.

50. The obligor, in a specialty which expressly acknowledges a consideration, is estopped to deny a consideration, or to aver a different one, unless he allege and prove fraud or mistake. *Thompson v. Buchanan*, 2 J. J. Marsh. 416.

51. Where one of the heirs to an estate is appointed an executor, with power to sell the real property for certain specified purposes, and he makes a conveyance not within the scope of his authority under the will, it would seem, that he might perhaps be estopped from denying that his own interest in the premises passed by the deed. *Allen v. De Witt*, 3 Comst. 276.

52. A fact recited in a deed will be taken to be true against the parties to the deed, and all claiming under them; and they are estopped for ever from denying the truth of it. *Inskip v. Shields*, 4 Harringt. 345.

53. If a man grants land by deed with warranty, and afterwards acquires title, this after-acquired title enures to the benefit of his grantee. *Gough v. Bell*, 1 N. J. 156.

54. Although a covenant of warranty in fee simple, by the grantor, in an executed deed, without words of inheritance in the granting clause, does not enlarge the estate of the

grantee, yet, to prevent circuity of action, he and his subsequent lessee, with notice, will be thereby estopped to claim the land. *Shaw v. Galbraith*, 7 Barr, 111.

55. And the widow of the grantee may avail herself of such estoppel, and under the statutes of Pennsylvania, although her dower has not been assigned. *Id.*

56. In such case, an agreement by the grantor, who is still living, to convey the premises to the lessee at his death, is not evidence for the lessee. *Id.*

57. A vendee, taking possession of lands under a conveyance completed by deed, may set up another title, or in any other way question his vendor's title. *Moore v. Parron*, 3 A. K. Marsh. 41.

58. By a mortgage deed, containing the usual covenants of seisin and warranty, the mortgagor is estopped from denying the title of the mortgagee, or his assignee. *Cross v. Robinson*, 21 Conn. 379.

59. One who receives a conveyance from husband and wife of lands the property of the wife, and enters and holds under that title, the conveyance being ineffectual to pass the estate of the wife, cannot, after her death, deny the title of her heir in a suit brought by him to recover the possession. *Drane v. Gregory*, 3 B. Mon. 619.

60. Such deed is admissible to show the character of the defendant's entry and holding. *Id.*

61. A. conveyed his property, consisting of land and goods and claims to B., in trust to pay A.'s debts, and to be sold for that purpose. B. made an irregular sale of such property, but A. was present at the sale and made no objection. Held, that A. was estopped from denying the regularity of the sale, and that he could not recover from the purchasers in an action of assumpsit the value of the property beyond the price which they paid; but if he had any remedy, it was in equity. *Lamb v. Goodwin*, 10 Ired. 320.

62. The assignee of all a lessee's "interest in and to the lease" may recover rent, subsequently accruing, of one to whom such lessee has previously leased a portion of the demised premises for the whole of the term, and who occupies such portion accordingly, in an action of contract, without

setting forth in his declaration the assignment from the original lessee to the defendant. And the defendant in such action is estopped to deny the estate of the original lessor in the premises. *Patton v. Deshon*, 1 Gray, 325.

63. The recital of a lease, in a deed of release, operates as an estoppel, and is conclusive evidence of the existence of the lease against the parties, and all others claiming under them in privity of estate. *Carver v. Jackson*, 4 Peters, 1.

64. A *bona fide* purchaser from one who has made a previous conveyance of the property by deed, fraudulent and void as to creditors or subsequent purchasers, is not estopped by the prior deed, although it may contain full covenants of warranty. *Stokes v. Jones*, 18 Ala. 734.

65. Acts *in pais*, subsequent to the execution of a deed for land, cannot estop the grantee, in a court of law, from asserting his title. The fraud, which at law will vacate the deed, must relate to its execution. *Id.*

66. A wife, joining her husband in a deed of her land, is estopped by her covenants therein. *Colcord v. Swan*, 7 Mass. 291.

67. Where executors, having power to sell and convey real estate, do sell and convey by deed, with covenant of warranty, such covenant estops the devisees of the testator from setting up and asserting an outstanding title against the vendee of the executors. *Robertson v. Gaines*, 2 Humph. 367.

68. A right to recover in a real action is not barred by a deed purporting to be a conveyance, but by which the right does not pass, unless by way of estoppel, as between the parties thereto. *Walcot v. Knight*, 6 Mass. 418; *Ricker v. Ham*, 14 Mass. 137.

69. A recorded deed of land, in which the grantor has no interest, but to which he afterwards acquires title by descent or purchase, passes an interest and a title by estoppel, from the moment such estate comes to the grantor, against him, those claiming under him, and strangers coming in after the estoppel. *Somes v. Skinner*, 3 Pick. 52.

70. A. grants land to B., in fee, with warranty, and then mortgages the same to C. without notice of the former conveyance, C.'s deed being recorded first. After B.'s deed is

recorded, C. assigns the mortgage to the demandant, who releases to A., and at the same time takes back from him a new mortgage with warranty. B. dies, leaving A. and the tenant his heirs, having been in possession during the time of all these conveyances. Held, that the release to A. operated, by estoppel, a discharge of the first mortgage. *Ib.*

71. But when the land came to A. and the tenant by descent, the demandant took A.'s moiety by estoppel, by virtue of the second mortgage. *Ib.*

72. Where one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the grantee or the grantor, and those claiming under him will be estopped to deny it. *Pike v. Galvin*, 29 Maine, (16 Shep.) 183.

73. But where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not enure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he is obliged to deny or contradict some fact alleged in his former conveyance. *Ib.*

74. The doctrine as to covenants in a deed, asserted in the case of *Fairbanks v. Williamson*, 7 Greenleaf, 96, overruled. *Ib.*

75. A. being in possession of land which the owner had contracted in writing to sell to him upon certain conditions, assigned the contract to B., and at the same time gave to him a deed of release of the land, containing a covenant that no person claiming under him should "have, claim or demand any right or title to the aforesaid premises, or to any part or parcel thereof, for ever." The conditions not being performed, the actual owner sold the land to a person from whom A. subsequently purchased the property, which he again conveyed to the person through whom the tenant claimed title. B., who had never been in possession of the premises, brought a writ of entry, and the court held that the title subsequently acquired by A. did not vest in B. by estoppel or otherwise, and that his action to obtain possession of the premises could not be supported. *Ib.*

76. The grantor of land is estopped by his deed from setting up a title under a patent made to himself; neither can his heirs, nor any person claiming under him, question the title of the grantee, on the ground that the patent is subsequent to the date of the deed. *Allen v. Parish*, 3 Ham. 107.

77. A., to defraud his creditors, exchanged a negro girl with B. for a negro boy, and took a bill of sale for the boy, conveying him to A.'s infant son. C. then purchased the boy of A., and sold him to B., by whom he was sold to the defendant. In an action for the slave, by the infant son, against the defendant, it was held, that the defendant was not estopped by the deed from B. to the plaintiff. *Moore v. Willis*, 2 Hawks, 555.

78. A deed to estop a corporation must be under its own seal; and where the deed of a third person, under his own seal, is set up against a corporation, the authority of such person to so bind the corporation must be proved. *Bank of South Carolina v. Rose*, 1 Strobb. Eq. 257.

79. Where a patent issued to husband and wife, and they joined in a conveyance thereof, but the deed of conveyance was not executed by her so as to pass her title, and the husband survived the wife, it was held, that her title vested in him, and enured to the benefit of the purchaser and sub-purchaser, who took conveyances *bona fide*, and without notice of any fraud upon the rights of the wife. *Patrick v. Chenault*, 6 B. Mon. 315.

80. Where lands are located and surveyed by the ancestor, and conveyed by him without having obtained a patent therefor, if his heirs, as such, take out a patent for the lands, they take by descent, and not by purchase, and are estopped to deny the validity of their ancestor's title. *Bond v. Swearingen*, 1 Ham. 395.

81. Where land was purchased with a right of way supposed to be appurtenant, and a price paid in proportion, the grantor is estopped from denying such right of way. *Ewing v. Desilver*, 8 Serg. & Rawle, 92.

82. Technical estoppels by deed or matter of record, some times concludes the party, without any reference to the moral

qualities of his conduct, but it is otherwise as to estoppels *in pais*. *Welland Canal Co. v. Hathaway*, 8 Wend. 483.

83. A release or other deed, when the releasor or grantor has no title at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise. *Jackson v. Wright*, 14 Johns. 193.

84. A covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant. *Derrett v. Doyler*, 9 Cranch, 43.

85. Though where the owner of property stands by, and knowingly suffers a stranger to sell it, in his own name and as his own property, without objection, and another person is thereby deluded into the purchase of it, the owner, by a just and salutary principle, is estopped to claim title afterwards to such property; yet, to render that principle applicable, the person to be estopped must have had knowledge of his rights; and it is an essential part of the principle itself, that his conduct must have superinduced the action of the purchaser. *Whittaker v. Williams*, 20 Conn. 98.

86. Therefore, where A. made an assignment of property for the benefit of his creditors under the statute of 1828, which was defective in an essential requisite, and the assignee, by order of the court of probate, and with the assent and approbation of A., sold, at public auction, such property to B., but the assent and approbation of A. were given under an erroneous view of his rights, and the facts were equally well known to him and B., and B. was not thereby misled, or induced to act differently from what he otherwise would have done, C. having afterwards attached the property as still the property of A., it was held, that under these circumstances, and as the title claimed by B. was derived, not from A., but from the assignee alone, the conduct of A. regarding the sale to B. did not, by estoppel *in pais*, validate such sale, or vest a title in B.; consequently, C.'s attachment would hold the property. [Two judges dissenting.] *Id.*

87. Where two grantors conveyed land, by deed of war-

ranty in common form, without any designation of the manner in which it was held by them, and one of the grantors died, and his widow brought her action of dower, claiming to be endowed of one-half of the premises granted, it was held, that the grantee was estopped by his deed from showing that the living grantor was seised in severalty of a much greater proportion of the premises described in the deed, and the deceased of a much less proportion than an undivided moiety thereof. *Stimpson v. Thomaston Bank*, 28 Maine, (15 Shep.) 259.

88. A statement in a deed, to operate as an estoppel, must be certain, precise and particular, and not merely general. *Naglee v. Ingersoll*, 7 Barr, 185.

89. The boundary line of land was described as running "along low-water mark to the mouth of a creek, before it was diverted and thrown to the north by the erection of wharves." Held, that the grantor was not estopped to deny that there had been any encroachment on the possession of the grantee. *Id.*

90. Where rent is reserved, in the nature of a rent service, out of land conveyed in fee by indenture, the grantee is estopped to deny that the grantor, to whom the rent was reserved, had title. And where the grantee enters upon the whole of the lot conveyed, he will be liable for the rent, although the grantor fails to prove his title as alleged in his declaration, in an action of covenant for the rent. *Id.*

91. In an action brought against a surety on a bond, the plaintiff is not estopped from denying the recital in an instrument under seal, between him and a third person, of an agreement to release the defendant from his liability on the bond; for estoppels must be mutual, and the deed cannot operate as an estoppel against the defendant, who is neither a party nor privy to it. *Wilkins v. Dingley*, 29 Maine, (16 Shep.) 73.

92. A party who has executed a deed is thereby estopped from denying, not only the deed itself, but every fact which it recites; and all persons claiming under and through the party estopped are bound by the estoppel. *Stow v. Wyse*, 7 Conn. 214.

93. Where a person executed a deed in behalf of a manufacturing corporation, and therein declared that he was empowered, by a vote of the company, to execute such deed, such person, as also those claiming under his deed, are estopped to deny that he was thus empowered. *Ib.*; *M'Donald v. King*, Coxe, 432.

94. In a deed of partition of coparcenary property, the party accepting land, as a part of the estate so held in coparcenary, was held to be estopped from denying that title, though the recital showed that the land was once vested in him by another title, the same recital showing that it had ever since that time been held, considered and enjoyed as part of the coparcenary estate. *Simmons v. Hendrickson*, 3 Harringt. 103.

95. Where a person executed a covenant, in which reference was made to a schedule annexed, subscribed by the covenantor, and it appeared that the schedule annexed was signed Delano & Burnham, and the agreement was signed Andrew Burnham, held, that the covenantor, having admitted, by his covenant, that his name was subscribed to the schedule, was estopped to deny that Delano & Burnham did not include his name, or to allege a misnomer, in avoidance of his covenant. *Smith v. Burnham*, 9 Johns. 306.

96. A married woman, who executes a warranty deed of her real estate, bearing date previous to her marriage, by the name which she then bore, with the fraudulent purpose of imposing upon some person to be affected by it, and without disclosing the fact of her marriage, does not thereby estop herself and her heirs to set up her title to the land as against her grantee, or against a purchaser from him without notice. *Small v. Daniels*, 2 Gray, 161.

97. Where a person executed a mortgage to another, and inserted covenants of warranty in it, held, that the mortgagor, and all those claiming title under him, were estopped by the covenants of warranty in it from asserting any title as against the mortgagee, and those claiming under him. *Rigg v. Cook*, 4 Gilm. 336.

98. A mortgagor is estopped from saying that no title was conveyed to the mortgagee. *Barly v. Lincoln Academy*, 12 Mis. 174.

99. Where a party not owning land conveys it by a warranty deed, a title subsequently acquired by him enures at once to the benefit of his grantee through the operation of the covenant of warranty, by way of estoppel, but not to the benefit of a party claiming under an attachment prior to the deed, and a levy duly made, who would be postponed in such case to the claimant under the deed. *Crocker v. Pierce*, 31 Maine, (1 Red.) 177.

100. In 1832, A., owning land, gave a bond to convey the same to B., on payment of certain notes. B. conveyed by warranty deed a part thereof, which came by similar deeds to C., who conveyed also, by a warranty deed, dated September 5, 1835, recorded October 11, 1839, to D. By deed given to B., August 16, recorded August 18, 1836, A. conveyed to B. A., a creditor of C., attached the land, May 14, 1836, and afterwards levied his execution thereon. Held, that B.'s title, acquired by A.'s deed, enured at once to the benefit of his grantee, and through his grantee at once to the benefit of those claiming under him by successive deeds of warranty, through the operation of the warranties, by way of estoppel, and not to the benefit of the attaching creditor, so that the title vested in D., unaffected by the attachment and levy. *Id.*

101. A mortgage was made by A. and his wife, of four separate pieces of land, of which three were the property of the wife and the other of the husband, to secure a debt before due from him; and an entry for condition broken was made by an attorney of the mortgagee, by entering upon one of the parcels belonging to the wife, having in his possession the mortgage deed, and stating, in the presence and hearing of the husband and of two witnesses, that he entered for condition broken; and afterwards certain acts were done amounting to a waiver by the mortgagee of the entry thus made; and, after the expiration of three years from the time of such entry, the mortgagee, with the assent and at the request of the husband, but without the knowledge of the wife, made a quit-claim deed of the premises to B., who was not, however, present at the time, which deed declared that the mortgagee did "remise, release, bargain, sell and convey,

and for ever quit-claim unto said B. the land described in said deed of mortgage, entry having been made to foreclose, and the right of redemption having expired, and the said B. having, at the request of said A., (the husband,) paid the amount which would be due on said mortgage. This release is made to said B. at the request of said A. and wife, and is intended to discharge all title acquired by said mortgagee." In a real action, brought by B. against A., the husband, it was held, that, as between them, B. was entitled to recover. *Rangely v. Spring*, 28 Maine, (15 Shep.) 127.

102. A. conveyed a tract of land to B., and took from him his bond to reconvey upon the payment of a certain sum. A. then conveyed to C., with warranty against all persons claiming by, through or under A. Afterwards, C., having the bond given by B. to A., paid A. the amount, and took a deed of the land in the name of A. D., a creditor of A., then extended his execution upon the land as the land of A. It was held, that he was estopped, by the warranty of A., to claim the land as against C. *Kimball v. Blaisdell*, 5 N. H. 533.

103. A confirmation under the act of congress of 1836, to an original claimant of land and his legal representatives, enures by way of estoppel to his assignee. *Wright v. Rutgers*, 14 Mis. 585.

104. If, in an action for the breach of covenant of seisin in fee, the plaintiff's pleadings set forth, and the verdict finds that the defendant had no seisin in fee in or title to any of the premises, and judgment is rendered thereon, the plaintiff will be estopped from setting up the deed against his grantor, if he should reclaim the land. *Parker v. Brown*, 15 N. H. 176.

105. Where A., without fraud and merely by mistake, shows to B., who has already taken a deed of a lot of land, certain points as the boundaries thereof, which were not its true boundaries, and afterwards acquires, by purchase from a third person, a good title to the adjoining lot, part of which is included within such boundaries; and subsequently a person claiming under B. gives a deed of the land included within the boundaries thus pointed out, with covenant of title, A. is not estopped by his acts from setting up his adverse

title to the part thus erroneously included, and consequently, in an action for breach of such covenant, the covenantee may set up as a breach the adverse title of B. *Ib.*

106. Where one sells land, not having a perfect title in himself, and afterwards takes a conveyance of the title, it will enure to the benefit of the vendee by estoppel. *Bush v. Marshall*, 6 How. U. S. 284.

107. Where the owner of a right of pre-emption sells the land, and for the purpose of perfecting his title, surrenders his title to the United States, that the land may be sold at public sale, if he himself becomes the purchaser, his title will enure to the benefit of his vendee; if the vendee becomes the purchaser, he will hold the land as trustee for the vendor. *Ib.*

108. An unmarried woman, in contemplation of marriage, conveyed her real estate to a trustee for her separate use; subsequently she and her husband and the trustee joined in a conveyance of the land in fee, subject to a ground rent, in which conveyance her trust deed was not referred to, nor had it been recorded. Held, that this conveyance, from both the parties in the first deed, vested in the purchaser a good title to the land discharged of the trusts created by it. *Kerr v. Kitchen*, 17 Penn. State R. (5 Harris,) 433.

109. Where there is a conveyance, and possession delivered by one having a voidable title, the defect may be cured after suit brought for the purchase money. *Ib.*

110. A. sold land to B., and in his deed made the formal acknowledgment of the receipt of the purchase money, and also covenanted against encumbrances. There was a mortgage on the property, which B. agreed to pay off, and this promise formed part of the consideration. B. did not pay the mortgage, and A. having paid it, sued B. for indemnity. Held, that the acknowledgment of the receipt of the purchase money, where the intention of the conveyance was not disputed, was merely formal, and that A. was not estopped to sue for the purchase money; also, that the covenant against encumbrances did not estop him from founding his action on the collateral agreement to discharge a mortgage. *Bolles v. Beach*, 2 N. J. 680.

111. The grantee in a deed-poll is not estopped to deny that the grantor had such an estate as he undertook to convey. *Great Falls Company v. Worster*, 15 N. H. 412.

112. Nor does the taking of a deed of land which sets forth, as its boundary on one side, "the land of A.," estop the grantee from denying the title of A. to such adjoining land. *Id.*

113. Nor does the fact that one holds an assignment of a mortgage, estop him from denying the title of the mortgagor to the premises, he not relying upon such mortgage title. *Id.*

114. A. conveyed certain property to B., in trust, to pay debts due to C. and others, specifying the amounts due to each. In a suit by A.'s administrator to compel the trustee to account, it was held, that the complainant was not estopped by his intestate's deed of trust from showing that the debts due C. and others were really less than the sums named in the deed, and that A.'s books were competent evidence of the amount of this indebtedness. *Griffin v. Macaulay*, 7 Gratt. 476.

115. A. had the legal title to certain land, and possession of the same; B. had the equitable title to the same. A decree was entered in a suit about the land in B.'s favor. The suit was compromised by B.'s giving A. a deed of the land, in which it was recited that it was the land for which B. had obtained a decree. Held, that A. was not estopped by the deed, or by his relation to B., from denying B.'s title. *Fauntleroy v. Henderson*, 12 B. Mon. 447.

116. Where the trustee of an infant is also its appointed guardian, and, as such, has annually, for fifteen years, accounted with the orphans' court for the proceeds of the trust estate, and been allowed credits exceeding, in amount, the yearly income of the estate, other than that embraced by the trust, his acts will be regarded as a recognition of his right to such proceeds as guardian, and, unless some error or mistake is shown, will estop him from denying it. *Wilson v. Knight*, 18 Ala. 129.

117. The grantee of land, conveyed by an intestate in his lifetime, with intent to defraud creditors, who has acted on such conveyance, and is himself a creditor, is not estopped

thereby, as one of the creditors of the estate, from availing himself of the fraudulent character of the conveyance. *Norton v. Norton*, 5 Cush. 524.

118. It is a general rule that, where one person purchases lands of another, he is not at liberty to dispute the title of his vendor; but this rule is subject to several exceptions. *Glen v. Gibson*, 9 Barb. Sup. Ct. 634.

119. One exception is, where the purchaser is in possession as owner, claiming title, and his original entry was not under the vendor. *Ib.*

120. Another exception is, where the vendee, although he entered under the purchase, yet, in making the purchase, was deceived or imposed on. *Ib.*

121. And it seems, that where it affirmatively appears that both parties were under an entire mutual mistake, even as to the law in regard to the right of the vendor to sell, it would form another exception to the rule. *Ib.*

122. Where a sheriff's deed is offered by the plaintiff to show the title under which the defendant holds, the plaintiff is not obliged to show the judgment and execution under which the deed was given, as he would have been if he had offered it in the line of his own title, because the defendant is estopped to deny the authority of the sheriff to sell, as he has entered under the sheriff's deed. *Morehouse v. Cotheal*, 2 N. J. 521.

123. Where a defendant in ejectment has taken a quit-claim deed of the premises from a person other than the plaintiff, he is not estopped from questioning the title of his grantor. *Bigelow v. Finch*, 11 Barb. Sup. Ct. 498.

124. In an action of debt by the assignee of a reversion, for rent reserved by deed indented, a parol agreement, made before the demise, between the lessor and lessee, was pleaded, by which the rent was agreed to be paid *in a particular way*, and averred to be paid *in that way*. The lessee was not estopped by his covenants from proving the parol agreement. *Farley v. Thompson*, 15 Mass. 18.

125. Where a party to a written agreement recites therein, as consideration, that the other party had made a certain conveyance, of even date with the agreement, he is estopped

to show, in avoidance of the contract, that such conveyance was not made until afterwards, though dated subsequently. *Dyer v. Rich*, 1 Met. 180.

126. The grantor in a deed is estopped to deny his grant, and his title to the estate conveyed. *Wilkinson v. Scott*, 17 Mass. 249, 257. But not the consideration expressed. *Ib.* 17 Mass. 249; *Davenport v. Mason*, 15 Mass. 85. But see *Griswold v. Messenger*, 6 Pick. 517.

127. A partition deed operates as an estoppel between the parties and persons claiming under them. *Jackson v. Hasbrouck*, 3 Johns. 331.

128. Accepting a deed from a grantor acts as an estoppel. *Murphy v. Barnett*, 1 Law Rep. 106.

129. If A. conveys land to B., to which he has no title, and afterwards acquires title, it enures to the benefit of B., against whom A. is estopped, by his deed, to set up a title. *Warburton v. Mattoa*, 1 Morris, 367.

130. A. conveyed to B., in mortgage, land, the title to which was in the United States. C. afterwards obtained a patent to the land, and conveyed it to A., who afterwards mortgaged it to D., with notice of the prior mortgage to B. Held, that the conveyance by C. to A. enured to the benefit of B., and that D. took only as second mortgagee; and that the rule was the same whether D. had actual notice of the mortgage to B., or only constructive notice, by the registry of B.'s mortgage. *Ib.*

131. An administrator, under authority of probate, sells to E. certain lands of the intestate, and by deed conveys to C. a special privilege of conveying a part of the water of a brook across other adjoining lands of the intestate, upon the lands sold. The land on which this privilege existed was afterwards legally distributed to the administrator, as heir at law of the intestate. The administrator then conveyed it by deed, without any reservation of the privilege he had granted, to C. After sundry conveyances, the title to the land distributed to the administrator became vested in the defendant, and the title of the land sold by him as administrator became vested in E. In an action brought by E. against D. for obstructing the water flowing through the de-

fendant's land, it was held, that the defendant was estopped to deny the right of the administrator to grant the special privilege as set forth in his deed to C. *Coe v. Talcott*, 5 Day, 88.

132. The grantee in fee, in either a quit-claim deed or in a deed containing covenants of warranty, is not estopped from denying that the grantor had any title in the premises conveyed, either at or previous to the date of the deed. Such grantee holds adversely to his grantor, and he may fortify his title by the purchase of any other. *Averill v. Wilson*, 4 Barb. Sup. Ct. 180.

133. Where, by an indenture freely executed between the parties, A. covenanted, that if a certain condition was not performed within a stipulated time, B. might enter upon, and hold and enjoy the premises, it was held, that he was estopped from questioning A.'s right, and that all persons claiming under or through him were equally bound by the estoppel. *Hill v. Hill*, 4 Barb. Sup. Ct. 419.

134. A party who makes oath to a mortgage under the statute, that it was intended to secure the debt therein specified, and for no other purpose, is not thereby estopped from proving that it was intended to delay or defraud creditors. *Demeritt v. Miles*, 2 Foster, (N. H.) 523.

135. A recital of a consideration in a mortgage estops the mortgagor or his representatives, from alleging that it was made without consideration. He may, however, show that the consideration is illegal. *Norris v. Norris*, 9 Dana, 317.

136. A party is estopped from proving any additional consideration repugnant to that stated in the deed. *Wolfe v. Hawers*, 1 Gill, 84.

137. A party took possession of land under a deed, conveying a life estate to his wife, with remainder to his children, and continued to claim under that deed. Held, that he was estopped from denying the title of his children under that deed, or from setting up an outstanding title. *Perry v. Calhoun*, 8 Humph. 551.

138. Where a grantor, in a deed of warranty, recites that a certain tract of land has been conveyed to him, he is estopped from denying that fact in a suit commenced against

him by the grantee, or any person to whom his grantee has conveyed. *Green v. Clark*, 13 Vt. 158. *

139. A party, whose father, from whom the land came to him by descent or purchase, had accepted a deed for a part of a tract of land from A., containing a recital that B., the grantee, had conveyed to A., is not thereby estopped from afterwards denying that B. was the real grantee of the whole tract. *Smith v. Asbell*, 2 Strobb. 141.

140. Where the truth appears in the same deed with other matter, which would otherwise work an estoppel, the party that would be so estopped may avail himself of such truth. *Warren v. Leland*, 2 Barb. Sup. Ct. 613.

141. A person defending his possession on no other ground than that one of the grantors in the series of deeds had no title, is bound by the recitals of the deed to the same extent as if he were privy to the grantor. *Kinsman v. Loomis*, 11 Ohio, 475.

142. The right of a consideration, admitted in a deed, cannot be contradicted for the purpose of raising a resulting trust for the grantor. *Graves v. Graves*, 9 Foster, (N. H.) 129.

143. The conveyance of land by one against whom there is an adverse possession is void at common law; but no estoppel is created thereby in behalf of the defendant in possession, if he be a stranger. *Jackson v. Brinckerhoff*, 3 Johns. Cas. 101.

144. If one tenant in common of land occupies the whole, and conveys it in fee, his grantee is estopped, in a writ of dower brought against him by the grantor, to deny the title and seisin of the latter in the whole estate. *Wedge v. Moore*, 6 Cush. 8.

145. The guardian of a person *non compos mentis* sold certain real estate belonging to his ward, under a license of court, and conveyed the same, with a covenant that he was duly authorized to sell the granted premises. It was held, that the guardian was estopped, by such covenant, from setting up a claim in his own right to any portion of such real estate, under a previous conveyance to him in his own right. *Heard v. Hull*, 16 Pick. 457.

146. The acknowledgment of payment of the consideration

money, in a deed of conveyance, does not estop the grantor from showing that a part of the money was left in the hands of the grantee, to be applied to the grantor's use. *Schillinger v. M'Cann*, 6 Greenleaf, 364.

147. If a grantee, with notice of a prior unregistered deed, convey to a second grantee with notice, both are concluded from setting up the subsequent deed against the prior unregistered deed. *Adams v. Cuddy*, 13 Pick. 460.

148. A. covenanted to make and deliver to B., at the end of a year, "a good and sufficient deed, with covenants of warranty," for a farm of 150 acres, then in the possession of B.; all the green grain growing in the ground at the time of executing the deed "to pass" to B. B. covenanted to pay therefor \$35 per acre, with interest from a day prior to the date of the contract. A. afterwards tendered the deed, pursuant to his covenant; but B. refused to perform his covenant, and A. brought ejectment against him. Held, that B., by his covenant, had recognised A.'s title, and agreed to hold under him for a year, and was therefore estopped from disputing A.'s title. *Tindall v. Den*, 1 N. J. 651.

149. A grantor is estopped to deny the title of his grantee. *Currier v. Earl*, 1 Shep. 216.

150. A title acquired by the grantor, after he has conveyed, by warranty, land to which he had not at the time a title, enures to the grantee by estoppel. *Lawry v. Williams*, 1 Shep. 281.

151. Where the validity of a conveyance was litigated and determined in a suit in equity, the representatives of the parties are estopped from litigating it in a new suit. *Burham v. Van Zandt*, 3 Selden, (N. Y.) 523.

152. The personal representative of a trustee, who held the trust estate to his death, is estopped from setting up another title to defeat that under which his intestate held. *Colburn v. Broughton*, 9 Ala. 351.

153. Where a deed of conveyance is not sufficient to pass the legal estate, a covenant of warranty of title, contained therein, does not estop the grantor. *Patterson's Lessees*, 5 Ham. 190.

154. A party is estopped from denying a title which is re-

cognised in a deed under which he claims. *Hart v. Johnson*, 6 Ham. 87.

155. A settler on land, for the purpose of perfecting his title, purchased an outstanding militia claim, and mortgaged back the land, with warranty, to secure the purchase money. The claim was afterwards confirmed, and the lands entered. Held, that such confirmation and entry enured to the benefit of the settler, although he had no title when he gave the mortgage, and that he and persons claiming under him were estopped to assert title against the mortgagee. *Rigg v. Cook*, 4 Gilm. 336.

156. A tenant in a writ of entry will not be permitted to set up, in defence, that nothing passed by a deed from the lawful proprietor to the demandant, by reason of a disseisin by the tenant, if the latter, three years afterwards, while continuing in possession, in writing, admits the title of the demandant, and contracts to pay him for the land, and has since occupied it as his tenant at will. *Kelley v. Kelley*, 10 Shep. 192.

157. A mortgagor is estopped to dispute a title derived under his mortgage, or to allege any thing in opposition to a claim founded on it, or to set up an outstanding title to defeat an action upon the mortgage. *Den v. Van Ness*, 5 Halst. 102.

158. In Connecticut, a deed of release does not estop the releasor to claim the right which it purports to convey. *Dart v. Dart*, 7 Conn. 250.

159. A., being seised in fee of an estate, joined in a deed of partition of the estate of his wife's father, and took this estate, *inter alia*, as his wife's share of her father's estate. Held, that the heirs of A. were estopped from claiming A.'s original title. *Simmons v. Logan*, 1 Harringt. 110.

160. A deed of conveyance, with warranty by husband and wife, of land of the wife, estops the wife to set up a subsequently acquired title. *Hill v. West*, 8 Ham. 222.

161. One holding a vested interest and a contingent interest in land, and conveying by deed, with warranty, "his right, title and interest" therein, passes his vested interest only by the deed, and is not estopped thereby to claim his

contingent interest when it becomes vested. *Blanchard v. Brooks*, 12 Pick. 47.

162. The acceptance of a deed-poll, by one in the possession of land, does not preclude the grantee from denying the title of the grantor, and relying upon her own possession. *Giles v. Pratt*, Dud. S. C. 54.

163. In an action of covenant for breach of warranty, by an assignee of a grantee, showing the grantor's want of seisin and title at the time of the grant, the grantor is not estopped to rely on his want of seisin as a defence. *Slater v. Rawson*, 1 Met. 450.

164. One, who had agreed to make a loan of money on a mortgage of real estate by the borrower, received instead thereof, at the request of the latter, as security for the loan, the note guaranteed by him, and mortgage of a third person, who, being present at the transaction, did not disclose the fact that he had been discharged from the note by bankruptcy. Held, that the promissor was not estopped by such concealment, to set up his discharge in bankruptcy in defence to an action on the note. *Cambridge Institution for Savings v. Littlefield*, 6 Cush. 210.

165. An estoppel, when it runs with the land, operates upon the title, so as actually to alter the interest in it, in the hands of the heir or assignees of the person bound by the estoppel, as well as in the hands of such person himself. *Jarvis v. Aikens*, 25 Vt. (2 Deane,) 635.

166. Where A. conveyed in mortgage a certain piece of land to J., of which A. had no valid title at the time, and the mortgage was duly recorded, and afterwards A. took a durable lease of the said land of the rightful owner, and conveyed the same by deed of warranty to M., subject to the yearly rent created by the said lease, and the deed of A. to M. was duly recorded, it was held, that the instant A. became the owner, the covenants in his deed to J. passed the estate to J., and that there was no title in A., when he deeded to M., as the title had passed to J. and was vested in him, and that the title of J. must prevail, as against M. *Id.*

167. In an action for breach of covenants of seisin and warranty, by the assignee of the grantee, the grantor pleaded that

he was not seised at the time of the execution of the deed, and the assignee took issue on the fact. It was held, that the assignee had thus waived his right to object that the grantor was estopped by his deed to deny his seisin, and that the jury were at liberty to find the truth. *Bartholomew v. Candee*, 14 Pick. 167.

168. Where a person has a recorded deed of land from the owner thereof, and also a recorded deed of the possessory right thereto from the occupant, and the latter afterwards conveys the land to a third person, the owner will not be estopped from asserting his title thereto, by reason of parol proof, that at the time of this latter deed, he stated to the grantee that the title was in the grantor. *Woodman v. Bodfish*, 25 Maine, (12 Shep.) 317.

169. The silence of a remainder-man, after learning of a conveyance in trust for creditors, by the person having a previous estate, is no estoppel to the assertion of his title. *Inge v. Murphy*, 10 Ala. 885.

170. Nor is the fact that the remainder-man is a beneficiary under the deed of trust, and receives money arising from the sales of other property conveyed by the same deed. *Ib.*

171. If a married woman, in consideration of the release of real estate to her, joins her husband in conveying to the releasor a different part of her real estate, without a separate acknowledgment, and she and her husband afterwards convey the released estate, by a deed accompanied with a separate acknowledgment, she and her heirs will be estopped in equity from taking advantage of a defect in the first conveyance. *Fulton v. Moore*, 25 Penn. 468.

172. Where a man is executor of a will in which real estate is devised, and permits the devisee to remain in possession of it, and attests, as a witness, a conveyance of it by the devisee, he would be estopped from claiming it as his own. *Ib.*

173. Reference to a note, in the condition of a mortgage, does not estop the mortgagee to prove that no such note was given. *Parker v. Parker*, 17 Mass. 370.

174. A grantor and his heirs are estopped, by the grantor's deed, conveying land bounded south and west on a street, to

deny that there is a street to the extent of the land on those two sides. *Parker v. Smith*, 17 Mass. 413.

175. One tenant in common conveyed to his co-tenant his undivided interest in a certain mill estate, "together with all the privileges and appurtenances thereto belonging," and afterwards purchased a lot of land on the same stream below. It was held, that he was estopped from making any claim for diversion, while the water was used at the mill in the same manner as when his interest in the mill was conveyed. *Olney v. Fenner*, 2 R. I. 211.

176. When one, who has made a deed with full covenants of warranty, purchases a paramount title after eviction of his grantee, such title does not enure to the grantee by way of estoppel, without his consent, so as to defeat his right to maintain an action on the covenant against incumbrances, and recover the consideration money paid by him and interest. *Blanchard v. Ellis*, 1 Gray, 195.

177. Where the deed of a grantor, acknowledging the receipt of the purchase money, has been put upon record, he is estopped from relying on a continuance in possession as a notice of a lien for unpaid purchase money. *Work v. Brierton and others*, 5 Ind. 396.

178. If one, in consideration of a sum of money, bargain and sell land, and in a deed of conveyance acknowledge the receipt of the purchase money, when in truth no money was paid, yet the bargainor is estopped by the deed to say the contrary. *Steele v. Adams*, 1 Greenleaf, 1.

179. An instrument under seal contained the names of the parties, a description of land, and covenant of warranty of the land described, against all persons claiming under the covenantor, but no words of grant. Held, that the covenant would operate as an estoppel by way of rebutter to prevent circuity of action, as between the parties and privies. *Brown v. Manteo*, 1 Foster, (N. H.) 528.

180. In a court of law, a party cannot controvert the legal effect of his deed of record. *Pennel v. Weyant*, 2 Harringt. 501.

181. Where two persons convey land by deed of warranty with covenants of seisin, the grantee, and all claiming under

him, are estopped to deny the seisin of each grantor in a moiety of the premises thus conveyed. *Hamblin v. Bank of Cumberland*, 1 App. 66.

182. The usual covenant against encumbrances, made or suffered by the grantor, in a quit-claim deed, does not estop him from setting up a subsequently acquired title. *Sweetser v. Lovell*, 33 Maine, (3 Red.) 446.

183. A covenant in a deed, that the grantor will warrant against all persons claiming under him, does not estop him from setting up any title subsequently acquired by him; but it is otherwise where there is a general covenant of warranty against all lawful claims. *Comstock v. Smith*, 13 Pick. 116.

184. On the principle of estoppel, a deed of lands held adversely to the grantor, is good, as between the parties, and the grantee can maintain ejectment against the adverse holder. *Harvey v. Carlisle*, 23 Ala. 635.

185. The grantor in a deed with general warranty, acknowledging a consideration paid, is estopped thereby from showing a want of title in himself. *Eveleth v. Crouch*, 15 Mass. 307.

186. A grantee in a deed is not estopped from denying the seisin of his grantor. *Small v. Proctor*, 15 Mass. 495.

187. Though one mortgaging a water privilege with general warranty is estopped by the deed to deny the mortgagee's title, if it appear in a case stated that nothing passed by the deed, the estoppel is removed. *Wheelock v. Henshaw*, 19 Pick. 341.

188. A defendant who holds by a conveyance which the jury have found to be fraudulent as to creditors, is not thereby precluded from insisting on an exception to the sufficiency of the extent under which the plaintiff, a creditor of the fraudulent grantor, claims title to the premises. *Whittier v. Varney*, 10 N. H. 291.

189. Where a deed of trust is made for the benefit of creditors, and a creditor accepts a dividend under it, he must be considered as affirming the deed. He cannot accept a dividend, and also set up a lien in opposition to the deed. If he attempts to set up such a lien, he should at least offer

to surrender the dividend. *Moole v. Buchanan*, 11 Gill & Johns. 314.

190. A widow released and quit-claimed to the demandant land, of which her husband has been seised during coverture, and the demandant claimed and received from the tenant, who was in possession of the land under a deed from the grantee of the husband, a conveyance of part of the land for the life of the widow, in lieu of her dower. Held, that the defendant was not estopped to claim an estate in the whole land, for the life of the widow, under a prior unregistered deed from the grantee of the husband, conveying the land to her for her life. *Bell v. Twilight*, 2 Foster, (N. H.) 500.

191. An acceptance of a deed is not such a recognition of the title of the grantor as to estop the grantee from setting up the plea of adverse possession under the statute of limitations. *Blair v. Smith*, 16 Mis. (1 Bennett,) 273.

192. A deed purporting to convey the whole title, though without warranty, estops the grantor and his privies as to the legal title. *Carter v. Chaudron*, 21 Ala. 72.

193. If one, having no title to land, convey the same with warranty, and afterwards acquire a title, and convey to another grantee, the second grantee is estopped to aver that the grantor was not seised at the time of his conveyance to the first grantee. *Wark v. Willard*, 13 N. H. 389.

194. Where A. held B.'s bond for the conveyance of land on payment of certain notes, and C. gave his own notes to B. to take up A.'s notes, and B. thereupon conveyed the land to A., and A. mortgaged the same to C., it was held, that A. could not be considered a mere trustee for C., in the transaction, but that C. would be bound by a previous conveyance of the land, with warranty, by A., of which C. had notice. *Ib.*

195. Where A., having no title to certain land, conveyed the same in fee and in mortgage to B., by a deed, with a general covenant of warranty, which was not acknowledged, and A. afterwards acquired the title to the land from C., and at the same time made a conveyance in fee and in mortgage to D., who, at the time, was informed of the prior deed to B.,

it was held, that the conveyance from C. to A. enured to the benefit of B., and that D. was estopped to deny that A. was seised at the time of his conveyance to B. *Ib.*

196. Where an interest passes under a deed there can be no estoppel. *Lewis v. Baird*, 3 M'Lean, 56.

197. If an executor executes a deed of land, the legal title to which remains in the government, and a patent afterwards issues to the executor, his deed operates by way of estoppel against him. *Ib.*

198. An executor, with power under the will to sell the real estate of his testator, conveyed the same with the covenants of seisin of his testator, and the devisee of the remainder, after the payment of debts and legacies, conveyed the same estate, on the same day, to the same grantee, with warranty, but without covenants of seisin. Held, that the devisee's deed only operated to confirm the title of the grantee, who was not estopped to deny the seising of the devisee. *Fickett v. Dyer*, 1 App. 58.

199. Though the vendor of land had but an equitable title, the purchaser who entered under him, looking to him to procure and convey the legal title, is estopped to deny that his vendor was, or that his heirs are, entitled to possession whenever he renounces his tenure under them, unless they consented to the renunciation; or unless he, with their consent, has acquired a superior title; or unless having, with knowledge, abandoned his allegiance to them, he has held adversely for twenty years. *Ogden v. Walker*, 6 Dana, 420.

200. But, in the absence of proof to the contrary, the holding of such *quasi* tenant or trustee will always be presumed to be as it was when he entered, under and not adverse to his landlord. *Ib.*

201. A. executed a deed to B., by which he sold all his claim in and to a certain piece of land called the C. Place, which was conveyed by C. to A.; which deed contained the following clause: "And the said A., for himself and his heirs, the said right, as it was vested in A., to the said B. and his heirs, against himself and his heirs, will warrant and defend. It is fully understood that if said title should prove

insufficient in law or equity, the said A. and his heirs are to have no recourse, he knowing the whole circumstances." Held, that A. was not estopped by the deed from purchasing another adversary title to said land, and setting it up against B. *Wynn v. Harman*, 5 Gratt. 157.

202. A testator devised land, in several portions, to his children, on a part of which he charged the support of his widow. In his lifetime he, jointly with his wife, had received a mortgage of such land, and, at the time of the execution of the mortgage, the land was conveyed to a son of the testator. All the parties submitted to the provisions of the will, and the land passed by conveyances to the innocent *bona fide* purchasers, in some of which the widow joined for the purpose of releasing the charge for her support. After such acquiescence for seven years, it was held, that she was estopped to set up such mortgage against the *bona fide* purchasers. *Ackla v. Ackla*, 6 Barr, 228.

203. Covenants which run with the land only operate as estoppels. *Boyce v. Longworth*, 11 Ohio, 235.

204. In an instrument under seal, where the parties bind themselves as principals, they are estopped at law from showing that they were only bound as securities. *Bank of Mount Pleasant v. Sprigg*, 1 M'Lean, 178.

205. Land was purchased by parties whose vendor assured them that he owned all the conflicting titles, and would guaranty to them indisputable rights. Held, that the purchasers could not be considered as holding under any of the titles exclusively, but must be viewed as holding under that which would give them the best right, and that they were not estopped from resisting eviction by relying on the elder grant. *Martin v. Reynolds*, 9 Dana, 328.

206. Where the grantor in a deed of quit-claim takes back a bond of defeasance, and afterwards becomes assignee of a mortgage before given by him to a third person, he is not estopped from setting up his title under the mortgage against his grantee and those claiming under him. *Hatch v. Kimball*, 2 Shep. 9.

207. The grantee in a deed of release, containing no covenants of warranty, is not estopped thereby to deny the re-

lessor's title, and claim the premises by an elder and better title. *Ham v. Ham*, 2 Shep. 351.

208. A. conveys land to B. with covenants against incumbrances; B. reconveys the land in fee and in mortgage to A., with similar covenants; B. is not estopped by the covenants in his deed from maintaining an action against A. for a breach of A.'s covenants. *Hayes v. Stevens*, 11 N. H. 28; *Brown v. Staples*, 28 Maine, 497.

209. The covenant of warranty on the part of a married woman being utterly void, cannot be valid as a ground of action, nor effectual by way of estoppel. *Dougal v. Fryer*, 3 Mis. 43.

210. The parties to a delivery bond are estopped to deny the ownership of the property described therein to be as therein recited. *Dickson v. Anderson*, 9 Mis. 156.

211. An estoppel by deed extends only to parties and privies thereto, and not to strangers. *Cottle v. Sydnor*, 10 Mis. 763.

212. A party to a deed is not estopped thereby in respect to the boundaries of his land, as against a stranger to the deed. *Ib.*

213. The tenant of a frame building, which had extended over an adjoining lot more than twenty-one years, was informed that a survey had been made by order of the owner of the adjoining lot, with the intention of building on the true line; he expressed his satisfaction, declining to examine the survey, and told the owner of the other lot to go on and put up the wall. Held, that after the work was commenced, the license became irrevocable, and that he could not recover in ejectment the land covered by the new party-wall. *Marsh v. Weckerly*, 13 Penn. State R. (1 Harris), 250.

214. If a widow, as administratrix of her deceased husband, sell land under a decree of court for the payment of debts, and in the deed of conveyance make no reservation or exception of her right of dower in the premises, yet she is not thereby estopped to claim such right. *Sip v. Lanoback*, 2 Harr. 442.

215. A deed made to a corporation before organization,

enures to their use after organization, by way of estoppel against the grantor. *Dyer v. Rich*, 1 Met. 180.

216. County commissioners having appointed agents to do certain acts required by law to be done by them, and taken bonds from them for the performance of such acts, they being neither unlawful in themselves or repugnant to the policy of the law, the agents are estopped to deny the authority under which they acted, and the bonds are valid. *Kitchens v. County Commissioners*, 4 Scam. 485.

217. If the husband and wife unite, by covenants of warranty, and conveying her land, the wife as well as the husband is estopped from denying title at the time. *Nach v. Spofford*, 10 Met. 192.

218. The grantee in fee, in either a quit-claim deed or a deed containing *covenants of warranty*, is not estopped from denying that the grantor had any title in the premises conveyed, either at or previous to the date of the deed. Such grantee holds adversely to his grantor, and may controvert such title, or strengthen his own by acquiring another title. *Sparrow v. Kingman*, 1 Comst. 242.

219. A *feme covert* is not estopped by her deed of conveyance from claiming the land by a title subsequently acquired; for she cannot bind herself, personally, by any covenants. *Jackson v. Vanderhayden*, 17 Johns. 167.

220. A party claiming under a warranty deed from a stranger, cannot say he is tenant in common with the plaintiff. *Siglar v. Van Riper*, 10 Wend. 414.

221. Where a party uses a deed in evidence for the purpose of showing fraud, and not to trace his title, he is not estopped by the recitals therein. *Rogers v. Walker*, 6 Barr, 371.

222. A mortgagor is estopped from denying that he had title at the time of executing the same; nor can he set up title in a stranger. *Barber v. Harris*, 15 Wend. 615.

223. A. having contracted under seal to be surety for the payment of a debt due by P., which debt was due on a certain contract of sale, is not estopped to show that the contract of sale was avoided, and that nothing was due from P. *Hazard v. Irwin*, 18 Pick. 95.

224. A., taking a mortgage of personal property, subject to

a prior mortgage to B., is not estopped, in a suit between himself and C., to show that the first mortgage was void. *Housatonic and Lee Banks v. Martin*, 1 Met. 294.

225. One claiming title under a party who is estopped to deny the title of the plaintiff, is bound by that estoppel. *Phelps v. Blount*, 2 Dev. 177.

226. Neither party to a deed of bargain and sale is estopped to show that one of the bargainors was a *feme sole*, although the deed recites that she was *covert*. *Brinegar v. Chaffin*, 3 Dev. 108.

227. A party executing a deed is estopped by the recital of a particular fact, to deny that fact. *McCaskey v. Lead-bitter*, 1 Kelley, 551.

228. A person who enters into possession of land under another, cannot question the title of the one from whom he holds. *Pierce v. Minturn*, 1 Cal. 470.

229. Where, in a deed of trust by a father to his son, a negro was mentioned, which had been previously conveyed by the father to the son, reserving his life estate, and it was shown that this fact was disclosed to the gentleman who drew the deed, and the latter informed the son that it was necessary to insert the name of the negro, as the father had a life estate, but that this would not affect the son's title, it was held, that the son was not precluded by his acceptance of the deed from asserting his right to the negro. *Raiford v. Raiford*, 6 Ired. (Eq.) 490.

230. A recital in a deed of the grantor's title does not estop the grantee, in a contest with another grantee of the same grantor, from denying the title so recited. *Joeckel v. Easton*, 11 Mis. 118.

231. A person, to be estopped by recitals in a deed, must in some way have been connected with it. *Goodwin v. Kensett*, 1 Smith, 126.

232. An owner of a plantation demised it to another, with the negroes, &c., thereon, for a term of years, the lessee covenanting to pay the rent annually, which was secured by a lien on the annual crops. Rent being due and unpaid, the lessor sued out a distress warrant, and had the same levied on the crop, stock, &c., on such leasehold estate, at the same

time that other *fi. fas.*, in favor of other judgment creditors, were levied on said property ; and he afterwards files a bill in equity, sets up his lien on a fund raised from the sale, by agreement, of the property levied on, dismissing the levy of the distress warrant. It was held, that he was not estopped by the suing out, or the levy, of said warrant. *Davis v. Collier*, 13 Geo. 485.

233. A., being the owner of a lot of land subject to a mortgage, conveyed a part of it absolutely to B., and afterwards mortgaged the residue to C. B. subsequently accepted a second deed from A. to his part of the lot. Held, that B. was not estopped by this second deed, as against C., to deny title in A., at the time of making the mortgage to C., to the part before conveyed to B. *Kellogg v. Rand*, 11 Paige, 59.

234. If the obligor on a bond sued for the benefit of the assignee thereof, knew that it had been obtained from him by fraud, and did not communicate his knowledge to the assignee, he would be precluded from setting up the fraud in defence. *Holbrook v. Burt*, 22 Pick. 546.

235. Where a writing is brought in by a party, merely as evidence, the other party may avail himself of it as an estoppel at any time, while it is competent for the court to instruct the jury as to the effect of evidence. *Hall v. Hawn*, 5 Dana, 55.

236. A., being in the occupation of certain premises, which were claimed by the selectmen of the town to be a part of the public highway, was notified by them, in conformity with the statute, to remove the obstructions placed thereon by him. It was claimed by A. that the *locus in quo* was part of an ancient highway which had been discontinued, but he gave no notice of such claim to the selectmen. In an action of trespass, brought by A. against the selectmen for removing such obstructions and reconstructing said highway, it was held, that A. was not estopped from showing such discontinuance, by reason of his neglect to notify the selectmen thereof, at the time of said notice from them. *Brownell v. Palmer*, 22 Conn. 107.

237. Conveyances of land held under the act of congress,

May 29th, 1830, granting pre-emption rights, are utterly void, and the covenants therein do not act by way of estoppel. *Stevens v. Hays*, 1 Carter, (Ind.) 247.

238. Where A., who had joined with other parties in conveying certain lands, with a special warranty on his part against all parties claiming under him, sought to be substituted in the place of one interested in the land, whose debts he had paid, it was held, that A. was estopped by his deed from setting up any title to the land, and that this estoppel ran with the land into the hands of the owner. *Fitzbush v. Tyler*, 9 B. Mon. 559.

239. A wife who joins in a deed with her husband is no party thereto, except for releasing her dower in the estate conveyed, and is not thereby estopped from setting up a subsequent title. *Blair v. Harrison*, 11 Ill. 384.

240. A., as guardian, sues B., and A. produces letters of guardianship, bond, &c. B. is not estopped to show that they were defective and void, though it appeared that he had contracted with A. as such guardian. *Conkey v. Kingman*, 24 Pick. 115.

241. A deed, whereby the grantor grants, bargains, sells, aliens, enfeoffs, assures, releases and confirms to the grantee, and to his heirs and assigns for ever, a tract of land lying within certain boundaries, (excepting parts of the described premises previously sold in fee, or leased in fee, or for life, by the grantor and his ancestors,) with the reversions, remainders, rents, issues, services and profits of the described premises, and also all the estate, right, title, interest, property, possession, claim and demand of the grantor, of, in and to the same, to have and to hold the said tract of land, excepting as before excepted, to the grantee, his heirs and assigns, to their use and behoof for ever, in as full and ample a manner as the same now is or had been had or enjoyed by the grantor or his ancestors, or lawfully might, if this deed were not made, be had and enjoyed by the grantor, his heirs or assigns, with a covenant, that the tract of land described, excepting as before excepted, is free and clear, and shall be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of the deed, freely

and clearly acquitted and discharged of and from all incumbrances and charges, other than leases given by the grantor or his ancestors, and one mortgage executed by the grantor, the grantee covenanting to pay off the mortgage and to execute leases previously agreed to be made by the grantor, estops the grantor from setting up a title afterwards acquired from his ancestors. *Van Rensselaer v. Kearney*, 11 How. U. S. 297.

242. Where A. had conveyed land to B., and afterwards conveyed the same land, with the consent of B., for a valuable consideration, to the wife of B., it was held, that it was competent for B. so to assent, and that he was estopped in equity to set up his prior title against that of his wife. *Dennison v. Ely*, 1 Barb. 610.

243. And her property being, in fact, the consideration of the deed to her, a court of equity would protect her title in her heirs, against her husband and those claiming under him, although she had notice of his prior deed. *Id.*

244. And if a purchaser of the premises relies on the recital in the deed to the wife, that it was made for a consideration out of her separate estate, the grantor in the deed to the wife will be estopped to deny such recital. *Id.*

245. So the administrator of the grantor would be estopped, in such case, to the same extent as his intestate would, to deny the title of the wife. *Id.*

246. In such case, the administrator of the grantor cannot maintain a creditor's bill against the husband, to have the land in the hands of the purchaser applied to the satisfaction of his debt, where the conveyance was made by the deed of the husband and the heirs of the wife; and the purchase money, to a greater extent than the value of the life estate of the husband, was applied to the payment of his debts. *Id.*

247. A person is always estopped by his own deed, and will not be allowed to aver any thing in contradiction of what he has once solemnly and deliberately avowed. *Lajoie v. Priman*, 3 Mis. 529.

248. A deed of land "bounding on a passage-way two rods wide, which is to be laid out between the premises and land of A.," the grantor "to make and maintain all the fence

between the said contemplated passage-way and the premises," estops the grantor, and those claiming under him, to deny the existence of the passage-way. *Dufts v. Charlestown*, 2 Gray, 271.

249. The commonwealth, having granted lands to aliens, is estopped by its own deed from setting up this alienage as a ground of recovery of the lands. *Commonwealth v. Andre*, 3 Pick. 224.

250. Parties and privies are estopped by recitals contained in a deed. *Stewart v. Butler*, 2 Serg. & Rawle, 381; *Jackson v. Parkhurst*, 9 Wend. 209.

251. This principle applies to the recital of one deed in another. *Crane v. Morris*, 6 Peters, 598.

252. But a recital in a deed which is inoperative, does not work an estoppel. *Wallace v. Miner*, 6 Ham. 366.

253. And where it appears, in that which would otherwise work the estoppel, that the act or deed is void, the party is not estopped from showing the truth. *Sinclair v. Jackson*, 8 Cowen, 543.

254. Thus a warranty, contained in a deed, void for champerty, is no estoppel to the heirs of the grantor. *Kercheval v. Triplett*, 1 A. K. Marsh. 493.

255. Recitals in a patent from the state do not estop one claiming by a title prior to the patent. *Weedman v. Kohr*, 4 Serg. & Rawle, 174.

256. Where, after a judgment obtained by the wife against her husband, for a specific amount, a public act has been made, signed by the husband and wife, fixing the sum due to her for dotal and paraphernal rights, as that established by the judgment, such public act is an estoppel to the wife's claiming from the husband, as against creditors, a larger amount. The persons have a right, on the faith of the public act, in connection with the judgment, to consider themselves safe in purchasing property of the husband, free from all claim on the part of the wife, except for the balance which, by the act, appeared to be due her. *Judice v. Kerr*, 8 Lou. 461.

257. Parties and privies alone are estopped by deed or by pleadings. They alone can take advantage of an estoppel. *Langer v. Felton*, 1 Rawle, 141.

258. A stranger is not bound by, neither can he take advantage of an estoppel. *Maguire v. Noble*, 11 Ill. 531.

259. Though in general the plaintiff cannot recover the possession of land without showing title in himself, yet if the defendant entered into possession, claiming under the plaintiff, and in subordination to his title, he is estopped from questioning it. *Hoen v. Simmons*, 1 Cal. 119.

260. The doctrine of estoppel or the principle of legal policy which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially where the latter has not received possession from the former. *Blight v. Rochester*, 3 M'Cord, 535.

261. So long as the conveyance exists, and the vendee is not evicted from the lands conveyed, he is precluded, in the absence of fraud, from disputing the title of the vendor. *Bliss v. Smith*, 1 Ala. 273.

262. Where a purchaser of real estate, for the purpose of quieting his title, buys in an outstanding claim of title, and one claiming under the vendor of such claim attempts to eject the purchaser, he is not estopped from setting up his first title. *Landes v. Perkins*, 12 Mis. 238.

263. A sheriff's deed of a defendant's land is an estoppel against the defendant, as would be his own deed. *O'Neal v. Duncan*, 4 M'Cord, 246.

264. Where in one clause of a deed of marriage settlement before marriage between W. and H., the property was settled in trust for the use of W. and H., for their natural lives, and W. covenanted in the deed that the whole property and its proceeds should belong to H., for her sole and separate use, it was held, that he was estopped by his covenant to set up any claim to the property on the death of H. *Williams v. Claiborne*, 7 S. & M. 488.

265. Where one conveys land, his heir is barred from denying the ancestor's title to the land at the time of conveyance. *Upshaw v. M'Bride*, 10 B. Mon. 202.

266. Where defendants took possession of the land under the complainant's title, claiming it as the heirs of A., who had contracted to convey it to the complainant, they

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cannot set up, whilst in possession, any other claim in opposition to it. But they may restore the possession, and if they have a subsequently acquired, though elder title, assert it. *Ib.*

267. A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, though not technically a warranty, is a covenant real, which runs with the land and estops the grantor. And wherever the grantor is estopped, all claiming under him are estopped also. *Fairbanks v. Williamson*, 7 Greenleaf, 96.

268. The extent of an execution raises an estoppel as much as if the conveyance were made by deed. *Schillinger v. M'Cann*, 6 Greenleaf, 364.

269. One holding under a conveyance in fee, from the husband of the demandant in dower, is estopped from controverting the seisin of the husband. *Hains v. Gardner*, 1 Fairf. 383.

270. The covenant of lawful seisin in fee, and good right in the grantor to convey, does not operate to estop him from setting up an after-acquired title, in himself, against the grantee. *Allen v. Sayward*, 5 Greenleaf, 227.

271. A defendant, who claims under a sheriff's sale, cannot set up against a third party claiming an estate in remainder, consequent on the determination of the life estate of the defendant in execution, that the third party witnessed and assented to a deed of the defendant in execution, conveying all his interest to one of the plaintiffs in execution. Not claiming under the deed, nor invested with any right under it, he is not in a condition to set it up. *Catterlin v. Hardy*, 10 Ala. 511.

272. Where a person conveys land, in which he has no interest at the time, but afterwards acquires a title to the same land, he will be estopped from claiming in opposition to his deed, from the grantee, or any person deriving title under the grantee. *Jackson v. Murray*, 12 Johns. 201; *Stevens v. Stevens*, 13 Johns. 316.

273. Estoppel does not lie against the sovereign power. Thus, it is competent for the state, succeeding to the royal rights, to show that nothing passed by the king's grant of

lands which he had previously granted to another. *Taylor v. Shuffard*, 4 Hawks, 116.

274. Where a person, holding possession of land under an executory contract of purchase, is evicted and turned out of possession by a writ of *habere facias*, on an adverse claim, he may purchase such adverse claim and assert the same against his former vendor. *Chiles v. Bridges*, Litt. Sel. Cas. 420.

275. A person coming into possession of land under an executory contract of purchase, will not be permitted to set up an outstanding elder grant against his vendor. *Hamilton v. Taylor*, Litt. Sel. Cas. 444.

276. The acknowledgment of such vendee, that he entered under such a contract, may be proved without producing the contract. *Id.*

277. A., who was distributee of an estate, in an action by B. to try the title of said estate, in which a recovery was had, disclaimed title, thereby acknowledging B.'s title: in another suit by B., this acknowledgment of his title was offered to prove the same, but as it did not appear that the trespass in the latter case was committed on the same part of the estate involved in the former case, it was held, that the disclaimer might operate as an estoppel in a suit by A., but did not amount to a conveyance by A. to B. *Murray v. Stephens*, 4 Strobb. 352.

278. Under Kentucky statute of 1801, a party may impeach the consideration of his deed. *Burdit v. Burdit*, 2 A. K. Marsh. 143.

279. An estoppel, against an estoppel, sets the matter at large. *Carpenter v. Thompson*, 3 N. H. 204.

280. Where a will recites a conveyance to an heir, another heir, claiming under the same will, is estopped from denying such conveyance. *Deane v. Cornell*, 3 Johns. Cas. 174.

281. A vendee who enters upon land under an executory contract, and afterwards sues upon his title-bond, and obtains satisfaction on ejectment brought against him, is estopped to deny vendor's title. *Fowler v. Woodyard*, 6 J. J. Marsh. 606.

282. In trespass, one bound by an estoppel cannot prove

a superior title in a stranger. *Sikes v. Basnight*, 2 Dev. & Bat. 157.

283. A conveyance, by husband and wife, of the wife's land, with covenants of warranty by both, estops the wife as well as the husband, to deny her title to the land at the time of the conveyance. *Nash v. Spofford*, 10 Met. 192.

284. A deed which recites a former deed and its loss, is evidence of it, and the grantor and his privies are bound by the recital. *McCesky v. Leadbetter*, 1 Kelly, 551.

285. The recital of a lease, in a deed of release, operates as an estoppel, and binds parties and privies, in blood, in estate and in law, but does not estop strangers, or those claiming under an adverse or anterior title to the deed. *Carver v. Jackson*, 4 Peters, 1.

286. A party who has defeated an action of assumpsit brought against him, by producing an instrument purporting to be under his seal, is estopped, as against the plaintiffs in that action, to deny the instrument to be his deed. *Philadelphia, Wilmington and Baltimore Rail-Road Co. v. Howard*, 13 How. U. S. 307.

287. A trustee who conveys a naked legal title, under a defective power, by order of the *cestui que trust*, with the usual personal covenants of warranty, and whose conveyance passes no title by reason of the defects in his power, is, by his covenants, estopped from setting up title against his covenantee, acquired by subsequent conveyances, vesting in him the legal title. *Barton v. Morris*, 15 Ohio, 408.

288. A. claimed title to land under the S. patent; and B., claiming the same land under the K. patent, executed a release to A. of the same land to which he claimed title. A. then brought an action against B. for a breach of the covenant of seisin, on the ground that the land was, in fact, within the S. patent, and that, therefore, the defendant was not seised, &c. Held, that the plaintiff, by accepting the conveyance from the defendant, was estopped from alleging that the land released to him did not lie within the K. patent, or that the defendant was not seised of the land, in consequence of the prior seisin of the plaintiff under the S. patent, which was the oldest. *Fitch v. Baldwin*, 17 Johns. 161.

289. Although the testator, at the time of making the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, are estopped from setting up any title inconsistent with that conveyed thereby. *Jackson v. Ireland*, 3 Wend. 99.

290. Although a covenant of warranty would bar, by way of estoppel, the heir and his issue from setting up title to the estate, such estoppel does not affect the purchaser under a judgment entered previous to the conveyance creating the estoppel. *Jackson v. Bradford*, 4 Wend. 619.

291. A recital, to amount to an estoppel, must come from the party to be estopped, and not from his opponent. *Miller v. Bagwell*, 3 M'Cord, 429.

292. An executor sold lands under a devise. A jury confirmed the judgment of the ordinary, refusing probate to the will. In a suit against the purchaser for the purchase money, the judgment of the ordinary, thus affirmed, was held no estoppel against a suit by the executor. *Crosland v. Murdock*, 4 M'Cord, 217.

293. In trespass *qu. cl. fr.* by A. against B., the defendant is not estopped to plead title to the premises by a former judgment against him on plea of title in an action by B. against A., for a former trespass upon the same land. *Richmond v. Hays*, 2 Penn. 492.

294. If the doctrine of estoppel can be applied so as to permit parties disturbing a partition, merely because there has been possession under it, there is much more ground for applying it where, as in this case, each owner has, by his deed, claimed to own a separate lot in entire, and has, under that claim, conveyed the land by deed or mortgage, and subsequent foreclosure, and received from the purchaser the full consideration for the entire title to the lot, under this representation, made by all and by each, that each held a lot separately in fee, and without any co-tenant. *Mount v. Morton*, 20 Barb. 124.

(b.) *By other Specialty.*

1. A party confessing judgment is estopped by his confession to afterwards deny its validity. *State v. Mangum*, 6 Ired. 369.

2. Both parties are estopped by a judgment, fairly rendered, upon a matter directly in issue, from afterwards bringing the same matter into controversy again. *Davis v. Murphy*, 2 Rich. 560.

3. A. made a partial payment on a note held against him by B., which payment B. failed to endorse on the note as a credit. B. afterwards sued A.—and, no appearance being entered, recovered judgment against him—on the clerk's assessment, for the full amount of the note. Held, that A. was estopped by the judgment from afterwards suing B. for the amount of the partial payment. *Id.*

4. A party, claiming an interest in land, who sees it conveyed to others without objection, or giving notice of his own claim, is usually estopped from afterwards setting it up as against that conveyance. *Shapley v. Rangeley*, 1 W. & M. 213.

5. In a contract under seal, if the defendant hinders the plaintiff from full performance of a condition precedent, or if he expressly waive it, under his hand and seal, he is estopped from insisting upon the failure of plaintiff in his defence. *Sherwin v. Rutland and Burlington Rail-Road Co.* 24 Vt. (1 Deane,) 347.

6. There is no estoppel *in pais* unless the party who sets it up has, by the acts or declarations of the other party, been induced to believe the existence of facts inconsistent with the claims of such other party, and acted on such belief. *Lawrence v. Brown*, 1 Selden, (N. Y.) 394.

7. Where a bond recites a certain injunction, the obligee is estopped from denying that there was such an injunction, unless he allege fraud or mistake. *Allen v. Lucket*, 3 J. J. Marsh. 164.

8. In an action on an appeal bond, the obligors are estopped to deny the existence of a decree which they have acknowledged, as the condition of the bond, to exist. *Kellar v. Hecler*, 4 J. J. Marsh. 655.

9. A., being tenant in common, conveyed to B., by one deed, a part of the land in severalty, and by another deed a certain number of acres of the land in common and undivided, which deed was not recorded. B. was present, afterwards, when the heirs of A., with C., were surveying the lot, spoke of the land he occupied in severalty as his, refused to sell it, &c., and made no mention of his further claim under the other deed. But he was not present when any conveyance was made by the heirs. Held, that he could not be estopped, by this transaction, from setting up his title under the second deed, if otherwise valid. *Great Falls Co. v. Worster*, 15 N. H. 412.

10. The fact that one has contracted with the widow and executrix of a party who has made some conveyance of land, (upon a consideration personal to herself,) to save the estate and heirs of her husband harmless from all damage on account of his not being the owner of the estate conveyed by him, does not estop the party contracting to indemnify, from denying the title of the grantee of the husband. *Id.*

11. A bond was executed by A., and placed in the hands of a third person, to be by him delivered over to B., in trust for certain females, on certain future contingencies. While the bonds were in the hands of the depositary, B. refused to accept the trust, for want of provision for his remuneration; but that difficulty being removed, he consented to accept it, and taking the bond into his possession, while the authority of the depositary was unrevoked, brought a suit thereon against A. Held, 1. That B.'s taking the bond and bringing a suit on it, was an acceptance of the trust, unless his previous declaration estopped him from such acceptance. 2. That as the condition of A. was not altered, in consequence of the declaration of C., it had not the effect of an estoppel. *Pond v. Hine*, 21 Conn. 519.

12. Where the appearance of a defendant to a suit is of record, it cannot be denied by plea or otherwise. *Thompson v. Emmert*, 4 M'Lean, 96.

13. The owner of personal property will not be estopped by his denial of his ownership, unless the conduct of the party to whom such denial was made was influenced by it,

and it was made for the purpose of having such influence. *Morton v. Hodgdon*, 32 Maine, (2 Red.) 127.

14. N., living in Virginia, brought two suits in South Carolina, and B., living there, became his security for costs. N. executed to B. a bond with sureties living in Virginia, to indemnify him. In an action by B. against N. and his sureties, the records of the suits brought by N., in South Carolina, were offered in evidence by B., and objected to, on the ground that they showed that B. had not become the surety of N. at the date of the bond of N. and his sureties to him. Held, that the defendants, not showing that B. was surety of N. for costs in any other cases, their bond must be held to refer to these suits; and they were estopped by their bond from denying that B. was the surety of N. at the time of its execution. *Curdle v. Burch*, 10 Gratt. 480.

15. Children are not estopped from setting up their claims to their father's property by reason of recitals in a deed in which they had joined, or under which they claimed, that the personal estate had been bequeathed to the wife absolutely. *McKonkey's Appeals*, 13 Penn. State R. (1 Harris,) 253.

16. In an action for breach of covenants of seisin and right to convey, the plaintiff is not estopped to deny the defendant's seisin and right to convey, by an assignment to the defendant, on the back of a prior deed of defendant to him, in these words: "Whereas the within named S. has executed another deed of the same premises, to be delivered to me upon the assignment of this conveyance to him, I do, therefore, in consideration thereof, re-assign and convey to the said Strong and his heirs the within described premises." *Smith v. Strong*, 14 Pick. 128.

17. While it was stated, by way of recital, in a submission to arbitrators, by A. and B., made in 1838, that various differences existed between them, which took place in the month of July, 1834, in consequence of B.'s putting up his mill-dam boards to the height of ten inches, which caused the water to flow back upon A.'s lands, for which he claimed damages from B.; the parties binding themselves to perform the award, and agreeing that it should be final and conclusive on them; and the arbitrators awarded a sum of money

to be paid by B. to A.; in an action afterwards brought by A. against B., for an injury to A.'s land by B.'s raising his dam, in 1833, higher than he had a right to raise it, B. claimed that A. was estopped, by the submission and award, from making the claim; it was held, that A. was not so estopped, there not being a single requisite of a legal estoppel. *Abel v. Fitch*, 20 Conn. 90.

18. A defendant, arrested upon a *ca. sa.*, gave bond for his appearance to take the benefit of the insolvent law. Upon the hearing, his application was rejected, whereupon he surrendered himself in discharge of his bail, and while thus in custody, executed another bond to the same plaintiff, which was approved by one of the associate judges, and he was discharged. He again made application for the benefit of the insolvent law, and was again rejected. Held, in an action on the bond, that although illegal, the defendant was estopped to set up illegality after receiving the benefit of it. *Egbert v. Darr*, 3 Watts & Serg. 517.

19. A creditor who receives his *pro rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud. *Crutchfield v. Hudson*, 25 Ala. 393.

20. In order to estop a party from proving a fact, because the fact had been found against him in a former suit, it must appear clearly, that the precise question was adjudicated in such suit. If the record relied upon leave this in doubt, there can be no estoppel. *Aiken v. Peck*, 22 Vt. (7 Washb.) 255.

21. Where a party makes admissions in the condition of a writing obligatory, he is estopped to deny, in a suit on the obligation, the facts thus admitted. *Trimble v. The State*, 4 Blackf. 435; *Love v. Kidnell*, 4 Blackf. 553.

22. The obligors in an administration bond are estopped thereby to deny the administrator's appointment. *Cutler v. Dickinson*, 8 Pick. 386.

23. A party executing an assignment, containing a release to the debtor, is estopped thereby to deny that he knew it contained a release. *Parsons v. Gloucester Bank*, 10 Pick. 533.

24. In an action of dower by the widow of T. B., the defendant set up an agreement before marriage, in bar ; held, that a record of a suit by the widow, against the personal representatives of T. B., wherein the marriage articles were set out as alleged by the defendant, was not evidence for him to prove the articles ; he should show some effort to produce the original, and if that could not be found, then, *semble*, the copy contained in the record might be resorted to as secondary evidence. *Barnett v. Barnett*, 16 Serg. & Rawle, 51.

25. Where a recognizance recites that the recognizor freely, voluntarily, and of his own will and pleasure, took upon himself its obligation, the recognizor is estopped from afterwards setting up, in an action for *sci. fa.*, upon the recognizance estreated, that it was extorted from him. *Whitted v. The Governor*, 6 Port. 335.

26. In an action of ejectment by A. against B. for a tract of land, A. introduced patents from the United States for the tract, and a lease under seal, made by one B. and C. for the same land. In the introductory part of the lease, C. described himself as the agent of A., but it was signed and sealed by C. Held, that B., in the present case, was estopped from denying, by the recitals in the lease, that C. was A.'s agent. *McClure v. Malone*, 5 Ind. 237.

27. Where parties, having actual or colorable claims to property, conveyed by two different deeds of trust, meet and enter into a special agreement, with reference to the trust property, this agreement is to be considered as ascertaining their respective rights and wills in equity, as between the parties, furnish the basis for settling their rights, independent of the trust deeds. *Pinkard v. Ingersoll*, 11 Ala. 9.

28. A voluntary conveyance, with covenants of warranty of lands, in which, at the time of the execution, the grantor had not such an interest as could be subjected by his creditors, either in law or equity, but to which he afterwards acquired title, is void as to creditors and *bona fide* purchasers, if made to hinder, delay and defraud creditors ; a voluntary fraudulent estoppel is impotent to defeat the just claims of creditors and *bona fide* purchasers. *Stokes v. Jones*, 21 Ala. 731.

29. The alienee of B., whose widow was entitled to dower, brought an action to try title against P., and prevailed. The widow, pending the action, sold and conveyed to P. all her estate and interest in the land. P., in the name of the widow, brought an action for her dower in the land. It was held, that the judgment in the suit to try title did not estop him from recovering. *Lamar v. Scott*, 4 Rich. 516.

30. The purchaser of land under a void decree, it being repudiated by the complainant, who claimed under a warrant only, are not estopped from averring that the entry and survey are void, for the purpose of showing that the complainants have no specific equity in the land, and therefore no right to demand the legal title. *Price v. Johnson*, 1 Ohio State R. 390.

31. An executor's bond, to pay the debts and legacies of a testator, estops him to deny a sufficiency of assets. *Stebbins v. Smith*, 4 Pick. 97.

32. If two tenants in common grant license to erect a dam on their land, held in common, each of them is estopped to claim damages for an injury occasioned thereby to land, held by him in severalty. *Francis v. Boston and Roxbury Mill Corporation*, 4 Pick. 365.

33. A resolve of the commonwealth, fixing the boundaries of certain lands, estops the commonwealth from denying those boundaries. *Commonwealth v. Pessepocut Proprietors*, 10 Mass. 155.

34. A party is estopped by an express acknowledgment in his covenant, unless it be shown to have been procured by fraud. *Norton v. Sanders*, 7 J. J. Marsh. 12.

35. A party cannot set up a title, in another person, contrary to a recital in his own deed. *Denn v. Brewer, Coxe*, 172.

36. Where a defendant serves copies of affidavits on a plaintiff, the originals of which are on file, he cannot afterwards object to reading the copies in evidence, but they are to be considered as equivalent to office copies. *Jackson v. Harrow*, 11 Johns. 434.

37. A party to a contract is estopped to deny the recitals therein, unless he also alleges that they were made by fraud or mistake. *Hunter v. Miller*, 6 B. Mon. 612.

38. The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped from denying that the principal was deputy, unless the bond is invalid. *Cecil v. Early and others*, 10 Gratt. 198.

39. The claimant of property levied upon is estopped by his bond from denying that a levy was made. *Henderson v. Bank at Montgomery*, 11 Ala. 855.

40. A recital, in a traverse bond, that an obligor had traversed the inquisition, estops him from denying the fact. *Wayman v. Taylor*, 1 Dana, 527.

41. Where a party has given a bond under seal to pay the purchase-money of land, reciting that the other party had "bound himself" to convey, he cannot deny that the bond was duly executed, unless it had been disavowed. *Augusta Bank v. Hamblet*, 35 Maine, (5 Red.) 491.

42. To an action brought by the indorsee of a promissory note against the maker, the defence was, that the note was usurious in its inception, and therefore void in the hands of the plaintiff; the defendant claiming, that by the laws of New York, where the note was made and negotiated, an accommodation note, put off by the payee, to raise money, at a greater discount than seven per cent. per annum, is usurious, even in the hands of a person who took it ignorant of its character; and that this was such a note, and was so discounted. To repel this defence, it was shown by the plaintiff, that the defendant, for the purpose of enabling the payee to negotiate the note, had given a writing signed by him, in the following terms: "Any note or notes, which may be offered by the bearer, for discount or otherwise, signed by me, and payable to the order of F. M., (the payee,) and dated March 1st, 1844, (the date of this note,) are good and true business notes." This writing was put forth by the defendant, to induce third persons to take the notes therein mentioned as business notes; and the note in question was received and discounted upon the faith and credit of such writing. Held, that the defendant was estopped to deny that this was good business paper, as against the plaintiff, the *bona fide* endorsee of one who had so received and discounted it. *Middletown Bank v. Jerome*, 18 Conn. 443.

43. Where A., who was entitled, as next of kin, to a certain interest in an intestate's property, conveyed her interest to B., who was also one of the next of kin, before administration was granted, and after the issue of letters of administration, A. and B., with other kinsmen, joined in a petition against the administrator for a division of the property, and the property conveyed to B. was assigned to A., it was held, in an action by B. against A. to recover the property, that A. was estopped from denying his title, and that B., by joining with A. in a petition for division, was not estopped from asserting his title against A. *Pass v. Lea*, 10 Ired. 410.

44. Where parties, interested in the estate of an intestate, met together and divided the estate without the intervention of an administrator, and executed receipts for the shares which they received, it was held, that after a lapse of nearly twenty years, the parties were estopped to deny the validity of the settlement, though all the forms of law were not followed. *Brockington v. Camlin*, 4 Strobb. (Eq.) 189.

45. An estoppel cannot be created by parol evidence helping out a record; it must appear from the record alone. *Jackson v. Wood*, 3 Wend. 27.

46. Such recital contained in a bond is evidence equally high even against the obligee, and all claiming under him. *Jackson, ex dem. Loop v. Harrington*, 9 Cowen, 86.

47. In such case the bond must be traced to the possession of the obligee. *Jackson, ex dem. Bradt v. Brooks*, 8 Wend. 426.

48. This class of recitals are received as primary proof of other instruments, even of records; a *ca. sa.*, for instance. *Ransom v. Keyes*, 9 Cowen, 128.

49. Where the mortgagee on a vessel took out a register in his own name as unconditional owner, and the vessel went to sea with this register as a part of her papers, held, by four judges against three, that the mortgagee thus made himself conclusively liable for supplies, disbursements and repairs, procured by the master. The court put it on the ground, that though in other cases, as between other parties, the register would be, at most, *prima facie* evidence of ownership, yet in respect to creditors who might have

acted on the register, in furnishing supplies, &c., the register should conclude; and they likened it to the usual case of a man being bound by the character or relation which he puts himself before the world as holding; and that if he intended to save himself from such a consequence, he should have endorsed his claim as mortgagee on the register. *Starr v. Knox*, 2 Conn. 215.

50. A bill of lading, signed by the captain, stated that freight was paid at Bengal, and was endorsed by the London consignees to another for value. Held, that the owners were concluded as to the assignee, though the statement as to freight was a mistake. *Howard v. Tucker*, 1 Barn. & Adol. 712.

51. A sheriff's endorsement of the time when he received a *fi. fa.* is conclusive against him, as between him and the creditor, as to the time. *Williams v. Lowndes*, 1 Hall, 579.

52. One may be equally estopped, as to two adverse claimants, so as to be concluded when sued by either. Thus, where a widow in possession, claiming dower, was estopped by deed given by her husband, she cannot remove the estoppel and defeat the bargainee, by giving up her possession to one claiming under a *fi. fa.* prior to the deed, and then immediately resuming the possession under him. *Grandy v. Bailey*, 13 Ired. 221.

53. Where a writ in detinue is served on the defendant twenty-four days after its issuance, the execution by him of a replevy bond for the property does not estop him from showing that it was not in his possession at the commencement of the suit. *Wallis v. Long*, 14 Ala. 738.

54. One who enters himself surety for the stay of an execution before a justice is not thereby estopped to show that the supposed judgment is in law a nullity. *Hamilton v. Parrish*, 1 Dev. 415.

55. Where, in a writ of entry, the counsel for the respective parties made, and filed in the case, a written agreement that the title to the demanded premises of the lessor of the tenant might be given in evidence in defence, and such lessor, in the same manner, under his hand, agreed "that his title should be tried in that action, the same as though the suit

was against him," and, on the trial, this title was given in evidence, a verdict returned for the demandant, and judgment rendered thereon, such lessor is estopped, by that judgment, to bring an action, demanding the same premises, against the grantee of the demandant in the former action. *Sevey v. Chick*, 1 Shep. 141.

56. One who takes possession of property tortiously, which is in contest, from the party who proves successful, is not estopped to show his right to the property taken by any decision in the suit. So of a purchaser. *Sutor v. Miles*, 2 B. Mon. 489.

57. In such case the cause of action was not suspended by the *lis pendens*, and property thus taken, after five years adverse holding, in Kentucky, cannot be recovered. *Id.*

58. Held, also, that Lewis, by his bond, had conveyed all his equitable interest to the defendant before the *teste* of the plaintiff's execution, and, therefore, there was nothing on which that execution could be levied. *Edney v. Wilson*, 5 Ired. 233.

59. A plaintiff in ejectment is not estopped from a recovery by a verdict and judgment in a suit against him and others as heirs of a third person, in which a plea of "heirs per descent" was interposed, and a verdict found generally, that the defendants had lands by descent, if such judgment was subsequently reversed, and where the verdict might have referred to other lands than those claimed in the action of ejectment, although previous to the reversal of the judgment the land claimed in the ejectment was sold under such judgment, and was then held by title derived from the purchaser. *Wood v. Jackson*, 18 Wend. 107.

60. The defendant in the action of ejectment cannot prove that, on the trial of the suit against the heirs, the question, whether the premises now claimed were held by the present plaintiffs as heirs, was passed upon by the jury. *Id.*

61. The husband of a demandant, having a reversion in expectancy, joined with the owner of the intermediate estate in a conveyance to the tenant in fee, with covenants of warranty, under which conveyance the tenant entered into possession of the premises. Held, that the tenant was not es-

topped by such deed and possession from showing the true title of the husband, and that under it the widow had no claim of dower. *Otis v. Parshley*, 10 N. H. 403.

62. The possessor of land at the time of a sale by a decree in chancery, is a *quasi* tenant of the purchaser, and is estopped from disputing his title. *Siglar v. Malone*, 3 Humph. 16.

63. The possession of a part of a tract of land which one claims is, in law, the possession of the whole; and if, while thus in possession, cultivating a part, he makes a parol contract to buy the land of another, also sets up a claim to it, and afterwards extends the fields which he had in cultivation, he cannot be considered the tenant of the other, so as to estop him from disputing the other's title. *Hough v. Damas*, 4 Dev. & Bat. 328.

64. Where both parties claim title under the same person, it is not competent to either, as such claimants, to deny that such person had title. *Ives v. Sawyer*, 4 Dev. & Bat. 51.

65. A tenant cannot, by merely ceasing to pay rent to his lessor, and paying to another person, change the tenancy so as to enable himself to dispute the title of his landlord, in an action of ejectment by the latter to regain the possession. *Belfour v. Davis*, 4 Dev. & Bat. 300.

66. One purchasing of a tenant in fee simple is, nevertheless, estopped from denying the landlord's title, though he had no notice of the landlord's rights, unless the title of the landlord is barred by the statute of limitations. *Lane v. Orment*, 9 Yerg. 86.

67. The tenant may dispute the title of his landlord, by showing that he was induced to acknowledge the tenancy and a misapprehension of the landlord's title, and that he was, at the time of such acknowledgment, in possession of the premises as tenant to another. *Swift v. Dean*, 11 Vt. 323.

68. The principal and sureties upon an administrator's bond, in a suit thereon, are estopped to deny the validity of a judgment obtained against the administrator, and for the non-payment of which the suit on the bond is instituted, unless that judgment was obtained by fraud or collusion. *Heard v. Lodge*, 20 Pick. 53.

69. A testator devising lands to A. and B., the latter being

appointed and acting as executor, and a creditor of the deceased afterwards recovering judgment against the executor, on demands barred by the statute of limitations, execution on which was levied on the lands devised, B. and his heirs are estopped to deny the validity of the judgment and execution. *Thayer v. Hollis*, 3 Met. 369.

70. In an action of ejectment, the lessors of the plaintiff claimed under a sale by execution, tested in March, 1832, against one Lewis. The defendant showed that Lewis had only an equitable title, and that, by bond bearing date in January, 1832, he had contracted to sell the same to the defendant. Held, that the title of Lewis having been equitable, the defendant could not, therefore, be estopped from insisting thereon. *Edney v. Wilson*, 5 Ired. 233.

71. Where one does not obtain possession from another, but being in possession, acknowledges his title, or attorns to him, he is not estopped from showing that he was mistaken in supposing the title to have been in such person. *Washington v. Conrad*, 2 Humph. 562.

72. After the relation of landlord and tenant has ceased, the lessee may set up any adverse title he may have held before the relation was entered into. *Smart v. Smith*, 2 Dev. 258.

73. A judgment rendered by a justice of the peace, where the subject-matter of the suit (*e. g.*, the right to flow lands) was not within his jurisdiction, cannot operate as an estoppel in another suit between the same parties. *Kintz v. M'Neal*, 1 Denio, 436.

74. A verdict and judgment, which would have been conclusive when pleaded before the abolition of special pleading, operate by estoppel when given in evidence under the general issue. *Sprague v. Waite*, 19 Pick. 455.

75. A verdict, to be a bar or estoppel, must be direct upon the very point of the issue, and not merely so by argument or inference. *Mallett v. Foxcroft*, 1 Story, 474.

76. If the demandant, in a writ of entry, has demanded a freehold, and the tenant has pleaded the general issue, he is estopped by the record from proving a tenancy at will. *Kelleran v. Brown*, 4 Mass. 443.

77. A town having brought trespass *qu. cl.* against a defendant, and he showing title, and the town producing the records of a suit between persons through whom the defendant (but not the town) claimed, by which it appeared the defendant had no title, it was held, that the judgment therein rendered was not an estoppel upon the defendant. *Worcester v. Green*, 2 Pick. 425.

78. The assignee of a mortgagor, in a writ of entry for the possession of the mortgaged premises, is estopped by a former judgment establishing the title, rendered in a suit by the mortgagee against the mortgagor, for the recovery of the same premises. *Adams v. Barnes*, 17 Mass. 365.

79. Plaintiff, alleging in his declaration the incorporation of the defendants, is estopped to deny that they had a charter. *Hinsdale v. Larned*, 16 Mass. 65.

(c.) *By Parol or in Pais.*

1. A., having executed a voluntary assignment, which was afterwards declared to be fraudulent and void, subsequently to the assignment petitioned for the benefit of the insolvent laws of Pennsylvania, and was discharged, but, through mistake, failed at the time to execute an assignment to the trustees appointed by the court, which was, however, afterwards done. A judgment was obtained against A., after his discharge, but before his assignment, on which the real estate was sold. On ejectment by the purchaser, against one claiming by conveyance from the assignees in the voluntary assignment, it was held, that the defendant might defend under the title existing in the assignees under the insolvent laws, and was not estopped from interposing that title because notice had been given at the sheriff's sale, by the voluntary assignees, only of the title claimed under the voluntary assignment. *Moncure v. Hanson*, 15 Penn. State R. (3 Harris,) 385.

2. Estoppel applies only where the second title is in the party falsely or incautiously alleging the first, and the opposite party is ignorant of the former title; it does not apply

where the sufficient title is outstanding in a third person, and was known to both of the contesting parties. *Ib.*

3. A person whose deed has been duly recorded, is not bound to give actual notice of his title to another, who, claiming under another title, and being in possession, is about to make some improvement on the property, the latter claiming under a deed to one which contained a reference to the deed to the former. *Knouff v. Thompson*, 16 Penn. State R. (4 Harris,) 357.

4. In an action for slanderous words spoken by the defendant, charging the plaintiff with having stolen certain cloth, the defendant, in pursuance of notice under the general issue, gave evidence tending to prove the truth of the words spoken by him. The plaintiff then gave in evidence a copy of the record of a judgment in his favor in an action of trover, brought by the defendant against him, to recover for the alleged taking and conversion of certain cloth; and it was admitted, that the cloth sued for in that action was the same cloth, and all the cloth, in reference to which the words charged as slanderous were spoken by the defendant. And it was held, that the record in the action of trover was conclusive upon the defendant, both as to the title to the cloth and as to the defence attempted to be set up by him in justification in this suit. *Perkins v. Walker*, 19 Vt. (4 Washb.) 144.

5. Where the surviving partner of a firm, which had been engaged in gambling, and had purchased and used a house for gambling purposes, sought to impeach the title by which a grantor of his partner held it, on the ground that it was used for unlawful purposes, he was held to be estopped by his privity to the grantor. *Watson v. Fletcher*, 7 Gratt. 1.

6. Where an execution debtor was present at a sale of land under the execution, and authorized the sheriff to sell more than the execution gave him the right to sell, and the purchaser took the sheriff's, and refused the debtor's deed, it was held, that the sale by the sheriff of the excess was not legal, and that the debtor was not estopped to assert his title to such excess. *Isaacs v. Gearheart*, 12 B. Mon. 231.

7. In an action against a constable on his bond, for neglect-

ing to sell property levied on execution, the defendant is estopped to show a different state of facts from what is set forth in the return. *Boone Co. v. Lowry*, 9 Mis. 24.

8. A party assigning a judgment is not estopped from asserting title to land against a purchaser under the judgment, where the lien of such judgment is divested by a decree in equity. *Buckmaster v. Ryder*, 12 Ill. 207.

9. A plaintiff in *fi. fa.*, requiring the sheriff to levy on the interest of the defendant in a lot of land, is not thereby prevented, in another suit, from contesting the title of the defendant in the *fi. fa.* to the land so pointed out. *Morris v. McCamey*, 9 Geo. 160.

10. Estoppels, technically so called, and estoppels *in pais*, also operate for and against corporations. *Selma and Tennessee Rail-Road v. Tipton*, 5 Ala. 787.

11. A mortgagee of certain premises requested the holder of a note of the mortgagor, in which the mortgagee was surety, to obtain judgment on the note, and levy on and sell the mortgaged premises; he was present at the sale, and asked one person to bid, and did not object to the sale. Held, that he was estopped to assert his title under the mortgage to the premises sold. *Morford v. Bliss*, 12 B. Mon. 255.

12. Where A. assigned to B. his interest under a deed of trust, which deed afterwards became the subject of a suit in equity, to which A. was a party defendant, he was permitted to answer that no debt was due to him from the grantor in the trust deed. *Griffin v. Macaulay*, 7 Gratt. 476.

13. The makers of a note, payable to a corporation, are estopped to deny the existence of the corporation. *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599.

14. Where one, who by settlement had acquired a right of preëmption, promised a party, who was about purchasing the section preëmpted, that he would not assert his claim, it was held, that he was estopped thereby from applying for a certificate from the land office. *Huntsucker v. Clark*, 12 Mis. 333.

15. One entering as sub-tenant, afterwards acquiring a perfect title, and then holding over, is estopped from disputing the landlord's title; he must surrender the possession. *Mill-house v. Patrick*, 6 Rich. 350.

16. To establish an estoppel *in pais*, there must be, 1. An admission inconsistent with the evidence offered to be given, or the claim offered to be set up. 2. Action by the other party upon such admission. 3. Injury to him by allowing the claim to be disproved. *Taylor v. Zepp*, 14 Mis. 482.

17. If an officer levies upon property, as the property of the defendant, he is not thereby estopped from subsequently denying that it is his property; the officer's return of the levy is only *prima facie* evidence against him. *Cassell v. Williams*, 12 Ill. 387.

18. Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the sheriff, without asserting his title, or making it known to bidders, he cannot afterwards set up his claim. And in such case, even infancy would be no protection, provided the mind had arrived at those years of discretion when a fraudulent intent could reasonably be imputed to him. *Whittington v. Wright*, 9 Geo. 23.

19. The plaintiff, in an execution issued on a judgment which bound a woollen and cotton factory, and the machinery in it, constituting part of the mill, directed the sheriff to levy on the real estate, and stated that the machinery had been assigned or belonged to another, and that he had nothing to do with it; and said to another person, after the sale, that he had purchased the factory and real estate, but not the machinery. Held, that this direction, and these declarations, if made in ignorance of his rights, and without consideration, and without the intention of relinquishing his rights, would not estop him from asserting his title to the machinery under the sale; that if the real estate brought less at the sale in consequence of his mistake of the law, it might be a reason for setting aside the sale, but would not estop the purchaser from maintaining replevin for parts of the machinery severed by another after the sheriff's sale. *Harlan v. Harlan*, 15 Penn. State R. (3 Harris,) 507.

20. Where a person having a title to real estate, acquiesces in the sale of it for a valuable consideration, by a person pretending to have title, and having color of title, he shall be bound by such sale; but it is material that the true owner

should be fully aware of his rights, and should intentionally, or by gross negligence, encourage or influence the purchase; that the purchaser should not be aware of the true state of the title; and that the proof should be full and satisfactory.

Morris v. Moore, 11 Humph. 433.

21. It is a well settled rule of law, that if an obligor induce a person to take an assignment of his bond, by admitting the justice of his debt, or declaring that he has no defence, he cannot afterwards deny it to the prejudice of the assignee. *Weaver v. Lynch*, 25 Penn. 449.

22. In order to create an equitable estoppel on the obligor, it is necessary for the assignee to prove, not only that he took the assignment, but that he paid a valuable consideration for it. *Ib.*

23. The declaration of a party whose goods were sold at auction, that he is not the creditor of the vendee, made under the supposition that the sale at auction was guaranteed, does not estop the party *in pais*, from claiming payment of a note made by the other in payment. *Nichols v. Arnold*, 8 Pick. 172.

24. In trespass for attaching property, the plaintiff was not estopped by his declaration, made at the time of the attachment, from showing his title to the property. *Wallis v. Truesdell*, 6 Pick. 455.

25. Otherwise, if the plaintiff acquired any advantage or the attaching creditor sustained any damage by such declaration. *Ib.*

26. If a person maintain silence, when in conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent. *Hall v. Fisher*, 9 Barb. Sup. Ct. 17.

27. Where a purchaser of land sold on execution silently allows another to expend money, and make permanent improvements upon the land, relying upon a supposed valid redemption of the premises, he is thereby estopped from objecting to the validity of the redemption. *Ib.*

28. Mutuality is an essential ingredient in all estoppels; and as a slave can neither be bound by a covenant nor hindered by an estoppel, the law will not allow him to claim

the benefit of an estoppel against another. *Bently v. Cleaveland*, 22 Ala. 814.

29. Where judgment creditors, having a lien on land, assent to a deed conveying the same land in trust to pay the debts of the owners, and by their conduct induce others to purchase the lands bound by their judgments, and to believe that they would look to the trustees for the payment of their claims, and not to their judgment liens, such conduct furnishes a valid equitable defence against the enforcement of the judgment liens by execution. *Doub v. Mason*, 2 Md. 380.

30. In such a case it would not be necessary for the purchasers to see to the application of their purchase money. *Ib.*

31. But it is incumbent on the purchasers to establish affirmatively that the judgment creditors, by their conduct, either in fact abandoned their liens, or by it induced the purchasers to believe that they designed to look exclusively to the trustees for payment. *Ib.*

32. Before a party is concluded by an estoppel *in pais*, it must appear, 1. That he has made an admission which is clearly inconsistent with the evidence which he proposes to give, or the title or claim which he proposes to set up. 2. That the other party has acted on the admission; and, 3. That he will be injured by allowing the truth of the admission to be disproved. *Carpenter v. Stilwell*, 12 Barb. 128.

33. A party, being in possession of land and claiming title thereto, knows that a judgment is in force against him, and that the sheriff has advertised the land to be sold on an execution issued on said judgment, permits the sale to take place without objection or notice to the purchaser, and suffers another person afterwards to redeem the premises without apprising him of any facts against the validity of the sale. Held, that his conduct is equivalent to an admission of the validity of the execution, and that he is estopped from insisting that the sheriff had no right to sell. *Ib.*

34. To create an estoppel *in pais*, a party must do an act, or make an admission, inconsistent with the claim he proposes to set up; and the other party must have acted on the admission, and will be injured by allowing the truth of the admission to be disproved. *Otis v. Sill*, 8 Barb. Sup. Ct. 102.

35. The act or admission must have been expressly designed to influence the conduct of another, and must, in fact, have influenced such conduct. *Ib.*

36. As between the mortgagee and the purchaser, at a sale of property acquired subsequently to the mortgage, but mentioned therein as being conveyed thereby, the former, by attending the sale upon the execution, and bidding upon the property, and omitting to give the bidders notice of his claim to the property, will be estopped from setting up, as against the purchaser, a right to a specific performance of the contract to give a mortgage of the property sold, under the execution. *Ib.*

37. Under such circumstances the principle of equity, that where one is silent where conscience commands him to speak, he will not be permitted to speak when conscience requires him to be silent, applies. *Ib.*

38. When the defendant in execution, having an equitable title to land, directs the sheriff to levy on it, which the latter does, and the land is sold, and the proceeds applied to the satisfaction of the execution, and the defendant delivers up possession to purchaser, assuring him that the title is perfectly good, he is estopped from setting up the legal title, subsequently acquired, against sub-purchasers for valuable consideration, who have paid the purchase money and received conveyances, without notice of the defect in title, and will be enjoined in equity from proceeding in ejectment at law. *Stone v. Britton*, 22 Ala. 543.

39. Where two brokers, instructed to effect insurance, wrote, in reply, that they had got two policies effected, which was false, in an action of trover against them, by the assured, for the two policies, they were estopped from denying the existence of the policies, and they were held as the actual insurers. *Park on Ins.* 4.

40. A party cannot be allowed to go behind an estoppel, and insist upon the validity of the claim on which the estoppel operates. *Pool v. Harrison*, 18 Ala. 514.

41. A. executed his note to B. for \$778. B., with the intent to defraud another, surrendered the note to A., with an agreement that it should be accounted for. B. died, and a

bill was filed by his administrator to compel A. to account. Held, that neither at law or equity could B., or his administrator, or distributees, hold A. accountable, and that they were alike estopped by the fraudulent surrender of the note. *Mulloy v. Young*, 10 Humph. 298.

42. When the real owners of slaves are present at a sale of them as the property of another, but are ignorant of their title, they are not chargeable with fraud in not forbidding the sale, and will not be enjoined from asserting at law their title, of which they were subsequently informed. *Tilghman v. West*, 8 Ired. (Eq.) 183.

43. Estoppels operate not only on present interests, but on rights subsequently acquired. *Bitting's Appeal*, 17 Penn. State R. (5 Harris,) 211.

44. Under the act of congress of March 23, 1823, where the register and receiver, under the advice and direction of the school commissioners appointed by the state, located land in lieu of the sixteenth section which was granted by the act of March 6, 1820, for the use of schools, and where the land thus located was sold under a law of Missouri, on the petition of the inhabitants of the township, and the money was applied to the benefit of schools in that township, it was held, that the state and the inhabitants of the township were estopped from afterwards claiming the sixteenth section. *The State v. Dent*, 18 Mis. (3 Bennett,) 313.

45. The rule as to estoppels *in pais*, as well as to those by deed, is, that both parties must be bound or neither. *The Cohoes Co. v. Goss*, 13 Barb. 137.

46. An infant is not estopped from pleading his infancy by any declaration he may have made as to his age, at the time of contract. *Brown v. McCune*, 5 Sandf. 224.

47. The doctrine of estoppel is inapplicable to infants. *Ib.*

48. A defendant, in a forthcoming bond, is estopped from denying that an attachment had issued, and that the property had been seized and taken by the sheriff; the recital in the bond admits these facts. *Criman v. Mathews*, 1 Scam. 148.

49. If a person having an encumbrance or security upon an estate, conceals his interest, and thereby enables the owner of the estate to obtain an additional advance upon it, he will

be postponed in a court of equity, to the second encumbrancer. *Chapman v. Hamilton*, 19 Ala. 121.

50. Estoppels must be reciprocal and bind both parties. They operate only on parties and privies in blood or estate. *Alexander v. Walter*, 8 Gill, 239.

51. Estoppels are of two kinds; by the record or by deed, and *en pais*. Estoppels *en pais* cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel under the direction of the court. *Ib.*

52. The doctrine of estoppel *en pais* stands on the broad grounds of public policy and good faith; it is interposed to prevent injustice, and to guard against fraud, by denying to a party the right to repudiate his admission, when those admissions have been acted on by persons to whom they were directed and whose conduct they were intended to influence. *Ib.*

53. Where both parties had derived their title to the premises under the will of a former occupant, and the defendants, or those under whom they derive title, had recovered the premises from the ancestor of the complainant, upon the ground that the legal title was vested in the surviving son of such former occupant by the will of his father, it was held, that the defendants were estopped from denying the title of such surviving son, under whose title they had succeeded in their action at law, the complainants claiming under a prior equitable title derived from such son. *Varick v. Edwards*, 11 Paige, 289.

54. Where a party, presenting a petition to a court, praying for the partition of lands held in common, stated therein that he, together with A., and the other defendants in the partition suit, were possessed of the lands as tenants in common, and such petition was sworn to, filed and became a matter of record, and the foundation of subsequent proceedings, it was held, that the petitioner was estopped by the record from afterwards denying that A. was a tenant in common with him, at the time of filing the petition. *Van Orman v. Phelps*, 9 Barb. Sup. Ct. 500.

55. Estoppels *in pais* generally consist of acts, declarations

or admissions, which have been acted upon by others, and are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. *Ryerss v. Farwell*, 9 Barb. Sup. Ct. 615.

56. It is of the essence of this species of estoppel that the representation or act should have influenced the conduct of the individual setting up or alleging it. *Ib.*

57. A vendor, who has induced the vendee to part with his money, is, in equity, estopped to assert a title to any part of the property inconsistent with his own declaration. *Dickson v. Green*, 24 Miss. 612.

58. If a party knowingly suffers another to purchase and expend money on land, under an erroneous opinion of the title, without making known his claim, he is estopped from exercising his legal right against such person. *Ib.*

59. Where a suit for a divorce, and to secure a separate estate, was compromised by the husband and trustees of the wife, and a given sum settled on the wife absolutely, with a right to dispose of it by will, and such compromise was made the decree of the court after the death of the wife, by the husband and executor of the will, it was held, that such decree was an estoppel of the husband's right to resist the probate of her will. *Wynne v. Spires*, 7 Humph. 394.

60. Only such representations—facts—as have influenced the conduct of the party sending them up, amount to an estoppel *in pais*. *Pounds v. Richards*, 21 Ala. 424.

61. Where land is irregularly sold on execution, and the defendant, or those representing him, with a knowledge of the irregularity, permits the sale to be completed, and the purchase money to be paid without objection, he is estopped to contest the validity of the sale afterwards. *Crowell v. McConkey*, 5 Barr, 168.

62. A person claiming title under one who is estopped, is also bound by the estoppel, unless it is fraudulent. *McCrahey v. Remson*, 19 Ala. 430.

63. A., who was the son-in-law of the plaintiff's testator, had possession of the slave in controversy, at the time of the testator's death, under a parol gift to his wife. The plaintiff, as executor, demanded the slave, to be appraised as part

of his testator's estate ; and A. delivered her up, admitting that she belonged to the estate. The slave was inventoried and appraised, and A. afterwards hired her from the plaintiff, and executed his note for the hire. While thus in possession of the slave, A. sold her to B., who sold her to C., against whom the executor brought detinue to recover her. To prove that the slave had been charged to him as the property of the estate, the plaintiff offered a transcript of a suit in chancery, previously instituted by himself, for a final settlement of the estate. It was held, 1. That the record was inadmissible for that purpose, unless offered in connection with other proof ; that to the fact which it sought to establish, could only be collected from the transcript, if at all, by inference from the character and objects of the suit. 2. That it was estopped, as against the executor, from setting up title to the slave under parol gift from the testator. 3. That the defendant claiming under it was also bound by the estoppel, unless it was fraudulent. *Id.*

64. A party cannot defeat a recovery against himself by alleging that a judicial proceeding, in which he was the actor, was irregular, where the action against him is founded on a contract by which he stipulated to prosecute it to a close, and a decree was rendered and executed previous to the institution of the action. *Brown v. Isbell*, 11 Ala. 1009.

65. The doctrine of *estoppels in pais* is one which, so far at least as that term is concerned, has grown up chiefly within the last few years. But it is, and always was, a familiar principle in the law of contracts. It lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon. He who, by his words or his actions, or by his silence even, intentionally or carelessly induces another to do an act, which he would not otherwise have done, and which will prove injurious to him, if he is not allowed to insist upon the fulfilment of the expectation upon which he did the act, may insist upon such fulfilment. And equally if he has omitted to do any act, trusting upon the assurance of some other thus given ; and which omission will be prejudicial to him, if the as-

surance is not made good, he may insist it shall be made good. *Strong v. Ellsworth*, 26 Vt. 373.

66. An officer's return on an execution, in connection with other facts *in pais*, cannot be pleaded specially, as matter of estoppel to the officer to deny the facts set forth therein, in an action against him to recover money, collected by him under the execution. *McBroon v. The Governor*, 4 Port. 90.

67. Although a tenant in possession has been induced by fraud or imposition to admit the title of, and to take a lease from a stranger, he may show the fraud or imposition to avoid an entry; yet where no such circumstances are shown, and he has accepted a lease, he cannot defend by showing that his possession, in the first instance, was derived from another, whose title he has always admitted. *Miller v. Bonsadon*, 9 Ala. 317.

68. A person who gives an accountable receipt for goods attached to the attaching officer, is estopped, in an action upon such receipt, from alleging, by way of defence, that the goods were his property. *Bursley v. Hamilton*, 15 Pick. 40.

69. A person whose land was sold under a *feri facias*, cannot be received as a witness to impeach his title to the land. *Plummer v. Lane*, 4 Har. & M'Hen. 72.

70. No admission of a debt by a party, much less by an agent, can be strong enough to preclude a party from showing that it was made in ignorance of his rights. *Rowan v. King*, 25 Penn. 409.

71. The purchasers of goods, sold and delivered under a warranty of soundness, are bound to make a prompt examination into their actual condition, and when they retain them some weeks without any offer to return them, or any complaint of damage, and especially where it is proved that some of the packages were opened, and sales were made during this period, they are estopped from showing that the goods were damaged when delivered, and claiming, on that ground, any deduction from the stipulated price. *Muller v. Eno*, 3 Duer, 421.

72. If a letter of guarantee acknowledge the receipt of

one dollar, as a consideration, the guarantor is estopped to deny the existence of that consideration, and it is sufficient to support the promise. *Lawrence v. McCalmont*, 2 How. (U. S.) 426.

73. An estoppel affecting the right of a party in real estate may be created by matter *in pais*, consisting of acts and declarations of a person, by which he designedly induces another to alter his position, injuriously to himself. *Brown v. Wheeler*, 17 Cowen, 345.

74. All the parties defendants to a bill of foreclosure in the Court of Chancery are estopped from questioning the title derived from the decree of sale. *Jackson v. Hoffman*, 9 Cowen, 271.

75. The doctrine of estoppel does not apply except as between the same parties acting in the same character. *Ib.*

76. A former decree in chancery operates as an estoppel only as to the facts put in issue and found. *Crandall v. Gallup*, 12 Conn. 365.

77. Therefore, where a bill seeking to set aside a deed, stated that the plaintiff was informed and believed that P. executed the deed in question, and then proceeded to state facts to invalidate it, but did not aver directly that P. executed the deed, it was held, that the execution of the deed not being in issue, a decree, finding the facts alleged in favor of the defendant, was not available to estop a party claiming against the deed. *Ib.*

78. Equitable estoppels, or estoppels *in pais*, grow out of the acts and declarations of the party sought to be charged, and are applied for the prevention of fraud, and to prevent a person who has been influenced by such acts and declarations from the injury of a denial. These things are necessary to constitute an equitable estoppel: 1st. That the party has done some act or made a declaration inconsistent with the truth, with the design of injuring another. 2d. That the party alleging the estoppel was ignorant of the truth, and relied on the faith of such acts and declarations. 3d. That injury will result to him by the denial. *Martin v. Angell*, 7 Barb. Sup. Ct. 407.

79. A tenant, who, after the expiration of a parol demise,

and payment of rent under the same, continues in possession without any new agreement with the landlord, cannot, in an action for the subsequent use and occupation of the premises, dispute his landlord's title; his subsequent holding will be deemed a holding by implied permission of the original lessor. *Osgood v. Dewey*, 13 Johns. 240.

80. When a sheriff sells land under an execution against the will or without the privity or assent of the defendant in the execution, the latter will not be estopped, in an action of ejectment brought by the purchaser, to show that he had no such right as that which the officer attempted to sell. *Major v. Deer*, 4 J. J. Marsh. 585.

81. The usual clause in a bill of sale of "this day sold," estops vendor from denying that it was made on that day. *Fribble v. Oldham*, 5 J. J. Marsh. 137.

82. An heir at law may be estopped by his administration account, rendered in the Orphans' Court. *Coulton v. Anthony*, 4 Yeates, 34.

83. A nominal plaintiff, in a suit brought for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against a subsequent suit for the same cause of action. *Welch v. Mandeville*, 1 Wheaton, 233.

84. An award being pleaded by a party, as an award made in pursuance of a contract on which the action was brought, the party is estopped to deny subsequently that it was made at the proper time. *Montague v. Smith*, 13 Mass. 396.

85. In *scire facias* against bail, they are estopped to deny the arrest of the principal. *Bean v. Parker*, 17 Mass. 591.

86. In an action by a subsequently attaching creditor against an officer, for a false return of the sale of an equity of redemption on execution, the plaintiff is not estopped by a representation made by him, when acting as an auctioneer, that the land was under no encumbrance but the mortgage, from maintaining his action. *Whitaker v. Sumner*, 7 Pick. 551.

87. Where a tenant, denying his liability for mesne profits, yet gave his note for their value, with the understanding

that if A., to whom he was to apply, should say he was not liable, the note should be given up, but never made such application, held, that he was not estopped to say that the note was without consideration and void. *Boston Bank v. Reed, Jr.*, 8 Pick. 459.

88. Though a bill of sale or deed, whether recorded or not, be void as fraudulent against creditors, or against the policy of the law, it is good by way of estoppel against the donor or grantor, or their executors, and those claiming under either of them. *Cluggett v. Salmon*, 5 Gill & Johns. 314.

89. Certain persons having done business for several years as a corporation, a member thereof is estopped to deny its validity on the ground that the first meeting was not legally called. *Chester Glass Co. v. Dewey*, 16 Mass. 94.

90. A party is not estopped, by his petition to the legislature praying that they would grant him certain land, to set up his title to such land. *Owen v. Bartholomew*, 9 Pick. 520.

91. After land is dedicated to public use, and enjoyed as such, and private rights are acquired in reference to it, the original owner is estopped to revoke such dedication. *City of Cincinnati v. White*, 6 Peters, 431.

92. Taking toll upon a turnpike laid out over an old country road, estops the corporation to deny their acceptance of it, or their liability for repairs. *Commonwealth v. Worcester Turnpike*, 3 Pick. 327.

93. A legatee, accepting a *pro rata* distribution of property, upon the failure of sufficient estate, is estopped thereby to claim more, until further estate is discovered. *Sheple v. Farnsworth*, 4 Mass. 632.

94. A written acknowledgment that the party claiming as landlord "has been put in complete and perfect possession of the land by the sheriff," and that the party charged as tenant "considers himself tenant of such landlord," does not estop the occupant from contesting the right of such claimant. *Norton v. Sanders*, 7 J. J. Marsh. 12.

95. He who enters upon land under the title of another, is estopped to deny such title. *Harle v. M'Coy*, 7 J. J. Marsh. 318.

96. Where a complainant brings money into court, insist-

ing that it is all that is due to the defendant, and the court makes an order that it be paid to the latter, upon executing a refunding bond, if the defendant execute the bond and receive the money, he will not be estopped from showing that a larger amount is due to him, and this although he does not bring into court the note which the money was intended to pay. *Byrd v. Odem*, 9 Ala. 755.

97. If a person has, in the acts of court, asserted himself to be part owner of a privateer, he will be estopped, by such acts, from denying his ownership in a subsequent claim for damages assessed against the owners by the court. *The Mary*, 1 Mason, 365.

98. An administrator, selling more land than is necessary for payment of debts and legacies, is estopped to deny the validity of the sales, in settling his account. *Jennison v. Hapgood*, 10 Pick. 77.

99. An executor, having ancillary administration in another state, and settling both accounts in the courts of Massachusetts, is not estopped by that act, when ordered to account anew, to settle his ancillary administration in the courts of the other state. *Ib.*

100. But having submitted to an auditor in Massachusetts a charge for lands sold in Vermont, and the auditor having made a decision upon it, he is estopped to object to the jurisdiction of the court. *Ib.*

101. In ejectment, the court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land for which the ejectment is brought, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions, within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff. *Howard v. Moole*, 2 Har. & J. 249.

102. An offer to pay a mortgage, not accepted, is no estoppel to a subsequent denial of the amount due, or of the right of the holder to enforce payment thereof. *Jackson v. Campbell*, 5 Wend. 572.

103. A party agreeing to purchase land, and admitting the title to be in the vendor, cannot set up a title in himself

under a deed obtained six years before such admission. *Sayles v. Smith*, 12 Wend. 57.

104. A., owning land, and acting as appraiser under a levy of an execution against B. thereon, is not estopped thereby from asserting his own title to the land. *Hurd v. Cushing*, 7 Pick. 169.

105. A., giving B. a bill of parcels of goods, and a certificate that he held them on storage for B., is estopped to say he never had the goods. *Chapman v. Searle*, 3 Pick. 38.

106. Where two persons obtained separate patents for the same invention, and afterwards a joint patent for the same, it was held, that neither was estopped by the separate patent from alleging that the invention was joint. *Stearns v. Barrett*, 1 Pick. 443.

107. An administratrix, having claimed money more than twenty years after the settlement of her account, as the property of the intestate, is estopped in an action on her bond to deny that she received it as such. *White v. Swain*, 3 Pick. 365.

108. A man living with a woman openly as his wife is estopped to show, in defence of an action of trespass *qu. cl.*, and to defeat an execution against him upon her property, that the marriage is void by reason of consanguinity. *Divoll v. Leadbetter*, 4 Pick. 219.

109. The defendants in a suit on a prison bounds' bond are estopped from pleading that the person to whom it was given, as jailor, was not in law and fact jailor at the time. *Crump v. Bennett*, 2 Litt. 209.

110. A wrong doer is estopped to allege his own wrong in order to enable him to plead the statute of limitations. *Lamb v. Clark*, 5 Pick. 193.

111. An acceptance of the provisions of a will estops a party from disputing the right of the testator to dispose of the property belonging to such party. *Preston v. Jones*, 9 Barr, 456.

112. A testator devised part of his own land and part of the land of his deceased wife, to his son, A., and the residue of his wife's land he directed should be enjoyed by his son,

B., to whom he also devised other land. He also directed, that in the event of B.'s marriage and having children, A. should make B. a title for A.'s half of their mother's land. A. and B. accepted the provisions of the will. Held, that each was estopped from denying the title of the other to the portion of their mother's estate so devised to the other. *Ib.*

113. Where the tenant, in a writ of entry, has disclaimed all title to the demanded premises, it is an estoppel to him and his assignees to set up any claim to the land which he had at the time of the disclaimer, against the demandant and his assignee; nor will an agreement, made after the disclaimer, by the demandant, to purchase all the right of the tenant in the land, set the estoppel at large. *Hamilton v. Elliot*, 4 N. H. 182.

114. Where real estate had come to a wife from her father and grandfather, and she had conveyed it to her husband, through the medium of a third person, and the husband afterwards commenced a suit in chancery, in the name of himself and wife, for a partition of a part of the estate and for other purposes, and the bill stated the original title of the wife to such real estate, without mentioning the subsequent conveyance of the property to the husband, and an interlocutory decree was made, declaring the rights of the complainants and defendants according to the case made by the bill, and the suit was afterwards compromised and settled between the complainants and defendants, and mutual releases executed, conveying the interests of the defendants in certain portions of the property in controversy to the husband, it was held, that as between the devisees of the husband and the heirs at law of the wife, the devisees were not estopped from showing that the lands actually belonged to the husband at the time of the filing of the bill, and at the time of the entering of the interlocutory decree in such suit. *Meriam v. Harsen*, 2 Barb. Ch. R. 232.

115. Where a person, by his acts or declarations, designedly induces another to alter, injuriously to himself, his previous position, such acts or declarations constitute an estoppel *in pais* against the former, which, as between him and the latter, will operate as effectually as a technical estoppel by

deed or record. *Kinney v. Farnsworth*, 17 Conn. 355; *S. P. Brown v. Wheeler*, 17 Conn. 345.

116. But ordinary, casual declarations or admissions, not made for the purpose of inducing any specific action, and on the faith of which no one has been misled, are not conclusive in their character, being entitled to have such weight only attached to them as, under all the circumstances attending them, they fairly deserve, in the estimation of the triers. *Kinney v. Farnsworth*, 17 Conn. 355.

117. A declaration, in the presence of a party, denying his title, and a proposition in his hearing to make a sale inconsistent with his rights, of which he takes no notice, will not preclude him from afterwards insisting upon his title, no sale inconsistent with his title having, in fact, been made. *Id.*

118. To estop one from asserting a title, by reason of his presence at a sale by another, without having made any objection, the subject-matter of the sale must be something in which his interest is direct and immediate. If there be an intermediate interest, on which his own is dependent, he cannot be estopped. Thus, if a person who is entitled to have the water flow to his house in a certain manner, by agreement permits others to take and use a part of it, their presence at a sale which is inconsistent with his rights will not estop them from having the use of the water, he not being present. *Id.*

119. Matters of estoppel *in pais* consist of the acts or declarations of a person, by which he designedly induces another to alter, injuriously to himself, his previous position. *Brown v. Wheeler*, 17 Conn. 345.

120. Where judgment was confessed for a debt secured by a personal mortgage, and execution issued thereon, and levied upon the chattels mortgaged, which were advertised for sale thereunder, and after the same property was sold upon another execution against the mortgagor, the mortgagees moved the Supreme Court for an order directing the sheriff to apply the proceeds of the sale upon their execution, it was held, in an action of trover by the mortgagees against the sheriff who made the sale, that these acts were repugnant to any claim under the mortgage, and precluded the plaintiff

from so claiming the property. *Butler v. Miller*, 1 Comst. 496.

121. A party is usually concluded by admissions or conduct upon which others have been induced to act; if he were permitted to prove that such admissions or conduct were false, such permission would operate as an injury to the persons who were misled by them. Such admissions and conduct, although they cannot operate as a technical estoppel, which can be by deed or record only, are yet said to operate by way of estoppel—an estoppel *in pais*. *Welland Canal Co. v. Hathaway*, 8 Wend. 483.

122. In estoppels *in pais*, it is an indispensable and essential requisite that the representations or acts should have influenced the conduct of the person setting them up or alleging them. *Ponds v. Ruhind et al.* 21 Ala. 424.

123. Admissions or declarations will not operate an estoppel against the party making them, unless he derives some advantage, or gains some object thereby, or the opposite party is induced to act upon it, or sustains some injury in consequence of trusting to its truth. *Hunley v. Hunley*, 15 Ala. 91.

124. The creditor is not estopped from showing the truth of the matter, because he may, under a mistaken view of his legal rights, have said that the arrangement made with the principal had discharged the surety. *Royston v. Howie*, 15 Ala. 309.

125. Although where a marshal, upon an order for a sale in a foreclosure suit, did not give the notice required by law to the executor of the mortgagor, yet, if the executor was served with process on the spot where the property was situated, and where the advertisements were posted up, was present at the sale, and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with; nor can the curator, who is appointed in his place. *Erwin v. Lowry*, 7 How. (U. S.) 172.

126. Where the holder of the legal title to certain lands acknowledges, in a letter of attorney, executed before a notary, and recorded in the office of the parish judge, in which

he authorizes their sale, that the attorney is a joint and equal owner with him of the premises, and the share of the latter is sold under a *fi. fa.*, and purchased by a third person, without notice of a private unrecorded act, from which it appears that the attorney was still indebted to the principal for the original price of the land, the purchaser under the *fi. fa.* will acquire a good title against the widow in community and the heirs of the principal; and the latter cannot take advantage of any secret equities against one who purchased upon the faith of such a public written declaration. *Richardson v. Hyams*, 1 Lou. 286.

127. The plaintiff sold goods to the defendant, who delivered notes for the price of the goods, with his name thereon as maker. Held, that he will not be permitted to deny that his name was signed by himself or his authority. *Blodgett v. Webster*, 4 Foster, (N. H.) 91.

128. Where one holds himself out to the world as guardian, he is estopped from denying it, as far as concerns those who are thereby induced to contract with him as such. *Bryan v. Walton*, 14 Geo. 185.

129. One can be barred by estoppel of his right to real estate only by deed or record, and not by an agreement not under seal. *Gerrish v. Proprietors of Union Wharf*, 26 Maine, (13 Shep.) 384.

130. An executory agreement does not estop a party to it from acting in violation of its provisions. *Id.*

131. Recitals and admissions in an agreement concerning real estate do not estop the party making them to deny their truth, except for the accomplishment of the purpose for which they were made, unless they become a part of or work upon the title. *Id.*

132. A technical *retraxit* is where a plaintiff, after declaration filed, comes personally into the court in which his action is brought, and declares he will not proceed further in it; and this is a bar to any subsequent suit for the same cause of action. But where a plaintiff, before declaration filed, addressed a writing to the prothonotary, entitled of the court and case, and proceeding in these words, "Sir, you are hereby authorized and required to discontinue for ever, and with-

draw the above stated suit for ever, on the presentation of this paper," which paper was signed by the plaintiff, and was filed of record by the prothonotary, it was held, that it was not a *retraxit*, but simply a discontinuance or nonsuit, and, consequently, was not a bar nor an estoppel to a subsequent suit for the same cause of action. *Lowry v. McMillan*, 8 Barr, 157.

133. The plaintiff proved that the defendant went into possession of the land in dispute under a former owner, by whom it had been mortgaged; that the mortgage had been foreclosed, the land sold under a decree in equity, and purchased by the plaintiff. The plaintiff was held to have good title against the defendant. *Griffin v. Wardlaw*, Harp. 481.

134. One who has a title to slaves will not be estopped, by any concealment or misrepresentation of such title, from setting it up against a volunteer. *Jones v. Sasser*, 1 Dev. & Bat. 452.

135. A written contract, supposed to be voidable by reason of fraud, may be affirmed by parol; and if a party, with full knowledge of all the facts, expressly reaffirms such contract, he is estopped from afterwards disaffirming it, by the principle of estoppel *in pais*. *Bronson v. Wiman*, 10 Barb. Sup. Ct. 406.

136. Where a matter in controversy in a suit has been adjudicated in a former suit between the same parties, parol evidence is admissible to show the identity; and then the record of the former recovery, if there have been no opportunity to plead it in the pending suit as an estoppel, may be given in evidence, and, as such, will be conclusive. *Perkins v. Walker*, 19 Vt. (4 Washb.) 144.

137. A party having covenanted to do nothing to interfere with the interest of another in a certain property, is thereby precluded from acquiring any title in future which could embarrass the title conveyed. *Wightman v. Reynolds*, 24 Miss. 675.

138. A party having once admitted another's title, by suing on a claim in his name, cannot defeat a title thus admitted, except by showing fraud or mistake. *Topp v. Pollard*, 24 Miss. 682.

139. An estoppel affecting the right of a party in real estate, may be created by matter *in pais*. *Brown v. Wheeler*, 17 Conn. 345.

140. Where there has been a sheriff's sale on an award without a judgment, proof of an agreement by the heirs of the defendant, that the surplus purchase money, after payment of the award, should be applied to the support of the widow of the ancestor and the plaintiff, who was one of the heirs, which was executed, and that plaintiff stood by when valuable improvements were made by the purchaser, and gave no notice of her claim of title, is admissible to work out an equitable estoppel in favor of the purchaser. *Hamilton v. Hamilton*, 4 Barr, 193.

141. A party in possession, acknowledging the title of another, is not estopped from subsequently disclaiming holding under such title, if the original entry is not under the person whose title is acknowledged. *Jackson v. Leek*, 12 Wend. 105.

142. A plaintiff having caused goods to be attached, and returned as the property of the defendant, is not thereby estopped from showing that they were the property of another. *Loomis v. Green*, 7 Greenleaf, 386.

143. One who has acted as an appraiser, in making an extent of an execution upon land, is not estopped to say that nothing passed by the extent. *Morse v. Child*, 6 N. H. 521.

144. Declarations, by one reputed to be the owner of lands, that the title was in A., made to one who thereafter purchased A.'s title, will not estop a subsequent purchaser under a judgment recovered against such reputed owner, at or about the time of his making such declarations, from setting up his title against the purchaser from A. *Shearer v. Woodburn*, 10 Barr, 511.

145. If the tenant has had the enjoyment and occupation of the land, he cannot, in an action by the landlord for the rent, repel his claim, by saying that the lease was void. *Watson v. Alexander*, 1 Wash. 340.

146. A bill of lading being signed before the goods are shipped or purchased, but the goods set forth being put on board before the vessel sails, operates, by way of relation and

estoppel, against the shipper and master. *Rowley v. Bigelow*, 12 Pick. 307.

147. In replevin of a horse, the defendant pleaded property in one G., and denied the title of the plaintiff; who replied that G.'s title was by sale from the defendant, after which the defendant again sold and delivered the horse, with warranty, to the plaintiff, who knew nothing of the prior sale, and relied on this by way of estoppel. On demurrer, it was held, that the defendant was not estopped to set up the title of G. against the plaintiff, and that the replication was ill. *Boies v. Witherell*, 7 Greenleaf, 162.

148. A town held its meetings in a parish meeting-house nearly fifty years, free of charge, and the parish afterwards sold the house to G. Held, that G. could not dispute the right of the town to hold meetings in the house, whilst it remained where it was erected. Held, also, that a grant, by the parish to the town, of a right to hold meetings therein, might be presumed from the long occupation of the house for that purpose. *Goff v. Inhabitants of Rehoboth*, 12 Met. 26.

149. The plaintiff proved that the defendant admitted that certain negroes sued for had been in his possession ten years, that they were the property of the plaintiff, and that he was willing to give them up when they wanted them; but the defendant proved his title to the negroes through a deed, and the court held that he was not estopped from setting up that title; that verbal admissions are conclusive only, when *in pais*, as these were, when others have acted on them, and have been led thereby to alter their arrangements. *Jones v. Morgan*, 13 Geo. 515.

150. The principle, that where one stands by and sees another laying out money upon property to which he has himself some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one who claims against some trust, lien or other right, not equally open and apparent to the parties, and in

favor of one who would be misled or deceived by such want of notice. *Casey v. Inloes*, 1 Gill, 430.

151. A person whose land is taken by a collector and sold for the payment of his taxes, is estopped to say, in an action brought against him for the lands, that he had no title, and that nothing passed by the sale. *Norwich v. Congdon*, 1 Root, 222.

152. A tenant can show that the relation between the landlord and himself has been dissolved, and then can be permitted to controvert the title under which he formerly held. *Camp v. Camp*, 5 Conn. 291.

153. A party who sees his promissory note transferred by the holder to a *bona fide* purchaser, for a valuable consideration, without giving notice of any defence or set-off which he may claim against it, although the note is not in form negotiable, is estopped from setting up such defence or set-off against the purchaser. *Tylee v. Yates*, 3 Barb. Sup. Ct. 222.

154. A party in possession of land is estopped to deny the title of him under whom he entered. But where the land is claimed under a sheriff's deed, the tenant is not estopped from showing that the title of the defendant in the execution was only equitable, and was not subject to sale under execution. *Million v. Riley*, 1 Dana, 359.

155. Verbal admissions, or mere presence at a survey, cannot operate as an estoppel *in pais*. *Valle v. Clemens*, 18 Mis. (3 Bennett,) 486.

156. A title to slaves cannot be acquired, in North Carolina, by parol estoppel. *Knight v. Wall*, 2 Dev. & Bat. 125.

157. A township is not estopped from denying that a pauper has a legal settlement in said township, because it has maintained such person, as a pauper, for a number of years. *Stillwater v. Green*, 4 Halst. 59.

158. In an action of debt on a note, the defendant is estopped from denying the existence of the payee at the date of the note. *Depew v. Bank of Limestone*, 1 J. J. Marsh. 378.

159. One who claims under an executory contract of purchase is estopped to deny the title of the vendor. *Riley v. Million*, 4 J. J. Marsh. 395.

160. Where an administrator was present at the sale of a slave belonging to his intestate, made by another person, and offered no objection to the sale, it was held, that he was not estopped, in his fiduciary capacity, from recovering the slave from the purchaser, although he might be estopped of his individual rights by such assent. *Magee v. Gregg*, 11 S. & M. 70.

161. A person receipting to the sheriff for goods as the goods of another, and re-delivering them, is not afterwards estopped to deny that they were the property of the other. *Johns v. Church*, 12 Pick. 557.

162. The promissor, in a contract of indemnity, is estopped to contradict his acknowledgment therein of having received the sum of money mentioned. *Drury v. Fay*, 14 Pick. 326.

163. The rule of estoppel *in pais* will not be extended in order to accomplish a fraudulent object, and a party will not be estopped by a declaration to a stranger, which has not been communicated to the party setting up the estoppel, in a way to influence his conduct. *Pennell v. Hinman*, 7 Barb. Sup. Ct. 644.

164. The rule regarding estoppels *in pais*, repeatedly sanctioned by this court, is, that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring, as against the latter, a different state of things as existing at the same time. *Dyer v. Cady*, 20 Conn. 563.

165. The owner of property, who stands by and permits another to buy it of a third person, cannot, nor can his privies, thereafter assert title thereto; and this rule extends to infants and *femes covert*. *Davis v. Tingle*, 8 B. Mon. 539.

166. To constitute an estoppel *in pais*, three ingredients seem to be necessary: first, misrepresentation or willful silence, by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and, thirdly, that injury would ensue from a

permission to allege the truth. *Commonwealth v. Moltz*, 10 Barr, 527.

167. An administrator who takes real estate on execution to satisfy a debt due to his intestate, and receives payment therefor, on its being taken from him for public uses is estopped to deny that the estate was liable to be levied on, or that he took any thing therein by the levy. *Phillips v. Rogers*, 12 Met. 405.

168. A verbal admission, by an administrator, of a claim against the estate, and that it will be paid, whereby a third person is induced to take the claim, estops the administrator from contesting the claim in the hands of such person. *Swenson v. Walker*, 3 Texas, 93.

169. Verbal admissions made by a party respecting property which is the subject of a suit, tending to show a sale to the other party, cannot estop him from showing the true nature of his right. *Isaac v. Williams*, 3 Gill, 278.

170. In order to estop a party from setting up a title to property, upon the ground that he has permitted another to sell it as his own, without making any objection, it must clearly appear that the sale was made with full knowledge on his part. It is not enough that he has notice that another is proposing to sell his property, and that he afterwards does sell it. *Watkins v. Peck*, 13 N. H. 360.

171. Though the holder of an equity, under an elder patent for land, may have surrendered possession to a junior patentee, yet he is not estopped thereby, after acquiring the legal title, to assert his legal claim. *Calhoun v. Baird*, 3 A. K. Marsh. 168.

172. Where a debtor, whose land was sold on execution under an impression that notice of the sale had been left at his house in his absence, takes a lease of the premises from his creditor, the purchaser, at the sale, he is not thereby estopped from denying the validity of the sale or the title of his lessor. *Schultz v. Elliott*, 11 Humph. 183.

173. In a bill of revivor, to revive a suit against a foreign executor and resident heirs and devisees, it was alleged that the heirs and devisees had no assets. Held, that this allegation, which was only tantamount to a suggestion that the

complainant, and the party for whose use the suit was brought, had no knowledge of any assets in the hands of the devisees or heirs, did not preclude or estop them from alleging and proving, in another controversy, that a bill of sale, which the decedent had made of certain slaves which had been sold under a decree in the suit, as assets in the hands of his heirs or devisees, was void as to his creditors, and that the slaves were therefore assets. *Warren v. Hall*, 6 Dana, 455.

174. A sheriff, making return that he had attached certain goods as the property of the defendants in the writ, is not estopped thereby to show that they had no property in the goods. *Arnold v. Brown*, 24 Pick. 89.

175. Where judgment is rendered against one, he is not estopped, upon a petition for review, to contradict the officer's return, that he summoned the defendant, or to show that the appearance by attorney was at the request of a third person. *Brewer v. Holmes*, 1 Met. 288.

176. A sheriff is not estopped, by levy and sale of property, to deny the plaintiff's right to the proceeds of the sale, nor from showing that the property sold under the plaintiff's execution was not the defendant's, nor liable to such levy and sale. *Hopkins v. Chandler*, 2 Harr. 299.

177. A. pleaded in abatement the non-joinder of others as defendants, and B. thereupon amended, and summoned those named in the plea, but afterwards discontinued against them. Held, that B. was not estopped thereby to deny that such persons promised, on a trial of the plea in abatement. *Wilson v. Nevers*, 20 Pick. 20.

178. A defendant, by permitting the death of one of the plaintiffs to be suggested on the record without opposition, before the trial commences, admits the suggestion to be true. *Henderson v. Reeves*, 6 Blackf. 101.

179. In a suit upon a judgment rendered in Ohio, where the defendants appeared by attorney, the defendants held to be estopped from pleading that they had no notice and did not appear. *Reed v. Pratt*, 2 Hill, 64.

180. One being surety upon a guardian's bond, and afterwards appointed judge of probate, and sued on the bond as

surety, was not precluded by a decree, made by him as judge of probate, allowing the guardian's account, in which the guardian charged himself with the proceeds of the ward's real estate, from showing that they were the proceeds of real estate sold under license. *Lyman v. Conkey*, 1 Met. 317.

181. Estoppels *in pais*, though not pleadable, may operate as a bar, under the direction of the court. *Bank v. Wollaston*, 3 Harringt. 90.

182. A party having set up an instrument upon the first trial of a cause, as a mortgage, which was subsequently decided to be an absolute bill of sale, is not estopped to rely upon it as absolute at a second trial. *Miller v. Baker*, 1 Met. 27.

183. A. suing B. on a note, and agreeing, when he commenced the suit, that he would pay to B., or certain others, whatever should be recovered of a trustee in the action, was held not to be estopped as against B., by this agreement, from giving the note in evidence. *Webster v. Randall*, 19 Pick. 13.

184. Nor was A. estopped to recover of the trustee. *Ib.*

185. One assigning dower by parol to a widow is estopped to say that the land was not subject to dower. *Shattuck v. Gragg*, 23 Pick. 88.

186. A sale or pledge of property by one who has no title, in the presence of the owner, estops him from impeaching the transaction on the ground of his better title. *Bird v. Benton*, 2 Dev. 179; *Governor v. Freeman*, 4 Dev. 472.

187. In a writ of entry, under Revised Statutes of Massachusetts, c. 101, the tenant is estopped to deny that he was in possession of the demanded premises at the time of the commencement of the action, if he plead the general issue, and do not give notice that he shall deny possession. *Wash-ton Bank v. Brown*, 2 Met. 293.

188. In an action against the purchaser of property at an administrator's sale, to recover the purchase-money, the defendant is estopped to show the illegality of the sale, in defence, so long as he retains possession of the property. *Harbin v. Levi*, 6 Ala. 399.

189. Nor can he require the plaintiff to prove the regularity. *Ib.*

190. If one procures a conveyance to be made of land, and is the go-between of the parties in accomplishing it, he will not be allowed to question the rights of third persons, from thence innocently deriving title. *Raugley v. Spring*, 8 Shep. 130.

191. A widow, in possession as such, of lands occupied by her husband in his life, is bound by an estoppel which bound him. *Bufferlow v. Newsom*, 1 Dev. 208; *Gorham v. Brenon*, 2 Dev. 174.

192. One giving a written promise to a sheriff to re-deliver goods attached and placed in his hands, is estopped, in an action on the promise, to show that the goods were not liable to attachment. *Smith v. Cudworth*, 24 Pick. 196.

193. S., being under guardianship as *non compos*, and making a will, the guardian is not estopped, by the fact of his guardianship, from showing that S. was of sound mind at the time of making the will, though the guardian is appointed executor, and made a legatee by the will. *Breed v. Pratt*, 18 Pick. 115.

194. If the inhabitants of a town, in making a road, deviate from the true location, they are estopped to deny their liability to maintain it as constructed, in an action against them for injury occasioned by want of repair. *Williams v. Cummington*, 18 Pick. 312.

195. Where A. and B., as sureties, paid the debt of C., the principal, and A. alone recovered the whole amount paid, by suit against C., B. was not estopped to recover his moiety of A., on the ground that he was called as a witness, and testified in A.'s suit against C. *Doolittle v. Dwight*, 2 Met. 561.

196. If an executor, having power to sell real estate for the payment of legacies, advise the legatees to compromise and settle a question of boundary, and they do so, such compromise is binding upon the executor ever afterwards, whether he claim as executor or in his own right. *Rice v. Bisler*, 1 Watts & Sér. 445.

197. In an action by an attaching creditor, against an officer, for negligently losing or misappropriating property which he had attached, the officer is not estopped from show-

ing the true value of the property by a judgment obtained by him against one to whom he had bailed the property, for safe keeping, such bailee being insolvent, and the judgment against him remaining unsatisfied. *Weld v. Green*, 1 Fairf. 20.

198. A former judgment is not an estoppel, unless the precise point which is to create the estoppel was put in issue and decided; and this must appear from the record alone. *Smith v. Sherwood* 4 Conn. 276.

199. Thus a former judgment by the defendant, in an action of disseisin, or the issue of *no wrong and disseisin*, is not an estoppel of the plaintiff's title in an action of ejectment, as the judgment might have been rendered on some ground not involving a question of title. *Ib.*

200. One who has paid money into court upon a *quantum meruit* count, is estopped to deny the contract as alleged. *Huntington v. American Bank*, 6 Pick. 340.

201. Obligor, in a jail-bond, is not estopped from pleading *nul tiel record* by the recital, in the bond, of the rendition of the judgment and the issuing of the execution, &c. *Stillman v. Bamey*, 4 Vt. 187.

202. A tenant, in a writ of entry, claiming a fee unsuccessfully under the general issue, is not estopped to claim an easement in the premises. *Tyler v. Hammond*, 11 Pick. 193.

203. If an action against the maker of a note be brought in the name of one only of two joint endorsees, and judgment be had therein, they are not thereby estopped to maintain a joint action against the endorser, as a guarantor of the same note. *Cobb v. Little*, 2 Greenleaf, 261.

204. A verdict that the demandant, when he took the deed under which he claimed, knew of a prior deed of the same land to the tenant, does not estop the demandant to deny that there was such a prior deed. *Spooner v. Davis*, 7 Pick. 147.

205. A decree, in a suit to which the administrator was a party, is not available to estop a purchaser, under a sale by order of a court of probate, who was not a party to it. *Crandall v. Gallup*, 12 Conn. 365.

206. Proving a debt, and receiving a dividend, under an unconstitutional insolvent law, does not estop the party to

deny that he assented to the insolvent's discharge. *Kimberly v. Ely*, 6 Pick. 440.

207. The sureties in the bond of a sheriff exercising that office are estopped to deny that he is sheriff. *M'Whorter v. M'Gehee*, 1 Stew. 548.

208. The equitable assignee in a chose in action is estopped, by the verdict and judgment thereon, in the same manner as if he were a party to the record. *Rogers v. Haines*, 3 Greenleaf, 362.

209. A former judgment in ejectment by default, in favor of the plaintiff, creates no estoppel to the defendant's title. *Bradford v. Bradford*, 5 Conn. 127.

210. A former judgment, in an action of ejectment, wherein the plaintiff declared merely that he was "well seised and possessed of the premises," will not estop the defendant, in that action, from setting up, in another action, a title in fee. *Ib.*

211. A former judgment in ejectment, against a tenant in possession, creates no estoppel to a title since acquired by him from one who was not privy or party to such judgment. *Ib.*

212. Where A., a creditor of B., recovers from C., on his disclosure, in the process of foreign attachment, a sum of money due from C. to B., as the purchase-money of land conveyed, he is not estopped, in a subsequent suit by him against C., from showing that such conveyance is fraudulent and void, as against creditors. *Wadsworth v. Marsh*, 9 Conn. 481.

213. In special assumpsit, the plaintiff is not estopped from giving evidence to support his claim, though it is inconsistent with the record of another action brought by him against the same defendant. *Hess v. Heeble*, 4 Serg. & Rawle, 246.

214. Where a defendant enrols the summons left with him in the service of a writ, and it appears, by that, that he was cited to appear at a different time and place from those where the writ was returnable, he is not estopped, by the sheriff's return, to allege what thus appears on record. *Nelson v. Sweet*, 4 N. H. 256.

215. A person who gives a note to a corporation is estopped to deny that there is such a corporation. *Con. Society v. Perry*, 6 N. H. 164.

216. If a town-way has not been legally laid out, and a return thereof made in writing under the hands of the selectmen, the town, in an action against it for damages, occasioned by a defect in the road, is not estopped from showing the illegality of the location, notwithstanding the road has been accepted and recorded. *Todd v. Rome*, 2 Greenleaf, 55.

217. A. and B., having a controversy, referred the same to arbitrators. C. appeared before the arbitrators, at the hearing, as B.'s agent. The arbitrators reported in favor of A., who procured judgment on the report, sued out an execution, and caused it to be extended upon land which B. had conveyed to C., and then brought a writ of entry against C. to recover the land. It was held, that C. was not estopped, by the judgment, to show that there was nothing due from B. to A. *Thrasher v. Haines*, 2 N. H. 443.

218. Where it appeared, from the record of the court, that the defendant was described as "late of N., in this state, but now absconded from this state," and that the defendant, after one continuance, was defaulted, and on error to reverse the judgment on such default, on the ground that the bond filed previous to the issuing of the execution was void, the defendant in error pleaded that after service, and before the sitting of the court, the defendant in the original suit returned to the state, it was held, that the party was not estopped from alleging the matter in such plea. *Smith v. Silliman*, 8 Conn. 111.

219. If, in an action of trespass *quare clausum fregit*, before a justice of the peace, the defendant justifies under the plea of title in himself, and thereupon removes the cause, by recognizance, into the Court of Common Pleas, where he suffers judgment by default, before issue joined, this judgment does not estop him from contesting the title of the same plaintiff, in a writ of entry subsequently brought for the same land. *Green v. Thompson*, 5 Greenleaf, 224.

220. The mortgagor is estopped from denying his seisin in

a suit to foreclose the mortgage. *Bush v. Marshall*, 6 How. (U. S.) 284.

221. An obligor in a bond which declares him to be a principal debtor is estopped to plead that he is merely a surety. *Shrigg v. Bank of Mount Pleasant*, 12 Dev. 257.

222. If the debtor acts in selecting the appraisers on an order of service and sale in a proceeding for foreclosure in the Circuit Court of the United States, held in Louisiana, and in giving directions to the marshal concerning the mode of sale, and these facts are known to the purchaser when he buys and pays for the property, the debtor is estopped from avoiding the sale by showing that the marshal had not taken the necessary steps to authorize him to sell. *Erwin v. Lowry*, 7 How. (U. S.) 172.

223. One object of the patent law, in requiring the inventor to put upon the public records a description of his invention, is to inform the public what may be safely done during the existence of the patent, without interfering with his claims; and, upon the soundest principles, the patentee must be held to be estopped from asserting a claim which is expressly waived on the record. *Bryan et al. v. Farr et al.*, Curtis C. C. 264.

224. The law of estoppel, by acts *in pais*, has been greatly extended in modern times. Its operation is so just that it commends itself to every fair mind; and it is sufficiently exact, certain and safe, when kept within the limits of the principles upon which it depends; and those principles require, that to constitute such an estoppel, a party must have designedly made an admission inconsistent with the defence or claim which he proposes to set up, and that another party has, with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be co-extensive with the estoppel. *Harris et al. v. Marchant et al.*, Curtis C. C. 144.

225. A debtor, having given a bond for the prison liberties, with the consent and knowledge of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity. *Id.*

(d.) *As Affecting a Tenant.*

1. A. sold and conveyed real estate to B., and remained in possession. After his death, his widow also remained in possession. The estate, after the sale to B., was sold, on execution, to C., and A.'s widow took a lease from C.; and it was insisted that she, being in possession under a vendee of B., had no right to attorn to C. Held, that the conventional principle of estoppel applies only to the relation of landlord and tenant created by contract, and not to that created by operation of law; that the widow was the lawful tenant of C.; and that the possession of C. having been, therefore, continuous for seven years, the Tennessee act of 1819, c. 28, vested in him the title. *Vance v. Johnson*, 10 Humph. 214.

2. A tenant, after the tenancy has terminated, and he has restored the possession to his landlord, may assert a title paramount against him, and the previous tenancy cannot bar his right to recover. *Smith v. Mundy*, 18 Ala. 182.

3. A party whose land is sold by execution against him, while he is in possession of the premises, is a *quasi* tenant of the purchaser, and cannot dispute his title—*aliter*, where he is not in possession. *Wood v. Turner*, 7 Humph. 517.

4. Where land was sold at execution sale, and after the sale the original owner, who was not in possession at the time of the sale, rents the land to a third person, it was held, that the relation of landlord and tenant existed between the parties, and that the tenant, who purchased the title of the purchaser at execution sale, could not set up the title of such purchaser against the original owner. *Id.*

5. Under the decisions in Tennessee, though one, who is in the possession of lands under a verbal purchase, may be presumed, in the absence of all proof to the contrary, to hold in the character of tenant at will, still it is a tenancy arising, not out of the contract, but by mere implication or construction of law, and the party so in possession is not estopped to deny the title of his vendor, and hold adversely as against him, and so holding for the space of seven years, his possession is protected by the second section of the act of 1819. *James v. Patterson*, 1 Swan, (Tenn.) 309.

6. A tenant may show that the title of his landlord has terminated, and that his relation as tenant is changed; or, if he become a purchaser under a judgment, he may set up his title in bar of an action brought against him by his landlord. *Tilghman v. Little*, 18 Ill. 239.

7. Where a person is induced to accept a lease from another by false representations, promises or threats, he is not precluded from afterwards disputing the lessor's title, especially when, at the time of accepting the lease, the lessee is in the quiet occupancy of the demised premises. *Baskin v. Leechrist*, 6 Barr, 154.

8. And it makes no difference in such case, that the false representations were made under a mistake of the lessor. *Ib.*

9. In Kentucky, under the act of 1843, a tenant, after entering upon the premises, cannot defeat his landlord's lien upon his property by mortgaging it. *Beckwith v. Bent*, 10 B. Mon. 95.

10. A person occupying a house, whether by an assignment or underletting from the lessee, or by his license merely, and at his will, is estopped from denying the lessor's title, for he came in under him and cannot withhold the possession, when the term has expired or been legally surrendered. *Kluge v. Lachenour*, 12 Ired. 180.

11. Where a tenant held under a landlord, who claimed an absolute title, it was held, that he could not set up against the landlord or his heirs a title in a third person, or any title adverse to that which he held under, even if he could show that the landlord's title had in fact terminated. (O'Neill and Frost, J. J., dissenting.) *Lyme v. Sanders*, 4 Strobb. 196.

12. A person entering premises under the title of another, is estopped from controverting his landlord's title at the time he entered, but not from showing that the title afterwards passed from his landlord to another person. *Ryerss v. Farnell*, 9 Barb. Sup. Ct. 615.

13. A tenant cannot dispute the title of his landlord until he has first *bona fide* surrendered his possession. *Greene v. Munson*, 9 Tenn. 37.

14. This rule extends to all parties claiming under the

lessor or lessee, so that the lessee's assignee or under-tenant cannot object to the title of the lessor or his assignee, any more than the lessee could. *Lainsferd v. Alexander*, 4 Dev. & Bat. 40.

15. Estoppel, as between landlord and tenant, does not apply between grantor and grantee in fee simple. *Osterhont v. Shoemaker*, 3 Hill, 513.

16. Where a tenant takes a lease of his landlord, and enters and enjoys, he cannot dispute the title of his landlord, either in an ejectment against the tenant, after the expiration of his term, or in an action for the rent of the demised premises. *Repean v. Budden*, 5 Barn. & Ald. 626.

17. So, though the tenant take the lease while he is in possession. *McConnell v. Bowdrie's Heirs*, 4 Monroe, 392, 400.

18. So, if he enter or continue his possession under a contract to purchase. *Norris v. Smith*, 7 Cowen, 717.

19. The assignee of a lease, who enters upon and occupies the premises, is estopped, in an action for rent, brought against him by the original lessor, to deny the validity of the assignment from the original lessee to him, and is liable to the lessor for the rent during the whole term, although he leaves the premises before the expiration thereof. *Blake v. Sanderson*, 1 Gray, 332.

20. A party who has gone into possession of land as the tenant of another, and acknowledging his title, is estopped from denying the validity of that title, and setting up a better right in himself, so long as he retains the possession, or during the continuance of the tenancy; but upon the termination of the lease and the restoration of the premises, he may sue and recover back the possession of the premises, upon showing a better title in himself. *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528.

21. Neither the tenant of land, nor any person claiming title by or through him, can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. *Cullender v. Sherman*, 5 Ired. 711.

22. A vendee of land, holding by an executed conveyance,

may fortify his title by the purchase of any other which may protect him in the enjoyment of the premises, although adverse to that of his vendor. The relation of landlord and tenant does not exist between them. *Kenada v. Gardner*, 3 Barb. Sup. Ct. 589.

23. A. rented a lot to B., and whilst B. was in possession, he made a verbal contract of purchase with A.; and continued in possession. Held, that he was tenant at will of A., and, as such, would be estopped from disputing his title *Winnard v. Robbins*, 3 Humph. 614.

24. A lessee cannot deny his landlord's title until he is discharged from the estoppel arising out of his lease and possession, by yielding up possession to his lessor. His acceptance of a lease from another, and acknowledgment of possession under him, will not discharge the estoppel; he may be equally estopped as to each. *Freeman v. Heath*, 13 Ired. 498.

25. When a landlord dies before the expiration of the term, the tenants become tenants of the heir, and can no more dispute the title of the heir than that of the deceased landlord. *Blanton v. Whitaker*, 11 Humph. 313.

26. A tenant is estopped from setting up against his landlord, as those who claim under him, a title adverse to that which he acknowledged by his tenancy. If he relies on a title acquired after the term of his landlord expired, he should show, or propose to show it in connection with his evidence of title. *Henley v. Branch Bank at Mobile*, 16 Ala. 552.

27. The rule that a vendee cannot dispute his landlord's title extends to the case of one who takes possession under a contract of purchase; he cannot controvert the title of the person who let him into possession. *Love v. Edmonston*, 1 Ired. 152.

28. A tenant is estopped from denying the title of his landlord, and interposing to it an outstanding title, which has never been asserted against him. *Pope v. Harkins*, 16 Ala. 321.

29. A tenant cannot deny the title of his landlord, or the person under whom he entered. He can show that the title of the landlord has expired, but this does not permit him to

show a latent defect in the line of the landlord's title, which would raise an outstanding title under which the tenant does not claim to hold, and to which he has not attorned. *Howell v. Ashmore*, 2 N. J. 261.

30. The gratuitous payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises. *Shelton v. Carrol*, 16 Ala. 148.

31. A parol agreement by a tenant in possession, at the death of the landlord, to pay rent to one claiming to be the guardian of the remainder-man, does not estop him from contesting the title of the remainder-man. *Stokes v. McKibbin*, 13 Penn. State R. (1 Harris,) 267.

32. In an action of ejectment, evidence of former admissions by defendant's father, that he was the tenant of the plaintiff, accompanied by evidence that defendant resided on the premises with his father, and had continued to remain there after his father's death up to the present time, will not estop the defendant, claiming merely by his own possession, from denying the plaintiff's title. *Emery v. Harrison*, 13 Penn. State R. (1 Harris,) 317.

33. A tenant who sets up no title, cannot dispute the title of his landlord. *Sims v. Glazener*, 14 Ala. 695.

34. An entry by one having the better title, with the consent of the vendee, continuing in possession under such agreement, and with notice thereof, is not subject to the rule which estops one entering by collusion with a tenant, from setting up an adverse title against the landlord. *Cravenor v. Bowser*, 4 Barr, 259.

35. The tenant cannot deny the title of his landlord, even though the lease be void; but after that relation ceases to exist, his rights to the land are not impaired by his neglect to do so. *Heath v. Williams*, 25 Maine, (12 Shep.) 209; *King v. Murray*, 6 Ired. 62; *Byrne v. Beeson*, 1 Doug. 179.

36. This rule is for the benefit of the lessor, and may be waived by him. *Wood v. Chambers*, 3 Rich. 150.

37. Nor can a tenant, by his own act merely, change the tenure so as to enable himself to hold against his landlord. *Byrne v. Beeson*, 1 Doug. 179.

38. But where A. complained against B., under the statute of forcible entry and detainer, in Ohio, for holding over possession of certain premises, leased by B. from A., contrary to the terms and conditions of the lease, and B. offered evidence in defence, that, at the time of the alleged leasing from A., he was in possession of the premises, under a valid and subsisting lease from C., it was held, that both B. and C., his landlord, might show these facts in defence, and this even though A. claimed title to the premises under an act of the legislature granting the same to him. *Ib.*

39. If the relation of landlord and tenant be established between the plaintiff and the defendant in ejectment, the latter is estopped from denying the title of the former, who may recover upon the admission of the title growing out of that relation. *Cody v. Quarterman*, 12 Geo. 386.

40. A stranger, who obtains possession through a tenant, though by purchase of the land, cannot dispute the landlord's title. *Lockwood v. Walker*, 3 M'Lean, 431.

41. The exceptions to the rule do not depend upon the fact whether the acknowledgment, as landlord, was prior or subsequent to the lessee's coming into possession, but upon circumstances of fraud, deception, mistake, &c. *Isaac v. Clarke*, 2 Gill, 1.

42. By receiving possession of land from another under a lease, the tenant impliedly admits that the lessor has such a title as authorized him thus to dispose of the premises; but he cannot be held to affirm any thing in respect to the future; consequently it is allowable for the tenant, when attempted to be ejected by the landlord, to show that the title of the latter had expired or been extinguished by operation of law. *Randolph v. Carlton*, 8 Ala. 606.

43. Where a tenant pays the rent, after the expiration of the year, which was due, according to contract, at its close, in an action by the landlord to recover the possession, such payment will not estop him from showing that the landlord's title was extinguished during the year. *Ib.*

44. The land of A. being levied on by an attachment at the suit of B., A. conveyed the same to C., under circumstances supposed to indicate an intention to defraud his

creditors. C. rented the land to D.; B. then obtained a judgment against A., and the land in question was sold to satisfy it. C. brought an action against D. to recover the possession. Held, that if D., the tenant, showed no title acquired subsequent to the commencement of his tenure, he could not defeat a recovery by showing the transaction between A. and C. to have been intended by them to delay, hinder and defraud creditors. *Ib.*

45. A tenant cannot dispute the title of the landlord under whom he entered; but where one, already in possession, acknowledges himself to be the tenant of another, he may destroy the effect of such acknowledgment, by showing that it was procured by fraud, or proceeded from a clear mistake as to title. *Givens v. Mullinax*, 4 Rich. 590.

46. A tenant is estopped from asserting the invalidity of his landlord's title. *McIntire v. Patton*, 2 Humph. 447; *Burke v. Hale*, 4 Eng. 328.

47. In an action of forcible detainer, after the relation of landlord and tenant has been established, the tenant, or any one coming in under the tenant, but claiming for himself, is estopped from denying the title of the lessor. *Newman v. Mackin*, 13 S. & M. 383.

48. The vendee is not tenant under his vendor, but is an adverse claimant against him, and may dispute his, title or set up against him or those claiming under him, an outstanding title. *Page v. Hill*, 11 Mis. 149.

49. A tract of moor land was leased by the proprietor of the manor of R., in 1707, to A., *in fee*, reserving an annual rent, and granting reasonable *estovers* out of the woods of the manor, &c. In 1763, A. granted to his son, B., a part of the premises, with common of *estovers* out of any part of the moor land of A., and afterwards devised to his sons, C. and D., the residue of the said tract—who, on the death of the deviser, entered and made partition. In 1791, an agreement was made between B., C. and D., and other tenants of the manor, with the then proprietor, by which the tenants agreed to surrender or release their former leases, and take new leases of the proprietor, at a certain rent; and new leases were accordingly accepted, for their respective lands, by B., C. and

D. Held, that B. was thereby estopped from all claim under the lease to him, and that the right granted to B., to take estovers from the other lands of A., was gone. *Springstein v. Schermerhorn*, 12 Johns. 357.

50. A tenant in possession, acquiring possession under the plaintiff's title, is estopped to impeach that title, or to show an elder outstanding title in another. *Connelly v. Chiles*, 2 A. K. Marsh. 242.

51. The plaintiff's lessor having never been seised, makes no difference in the principle. *Ib.*

52. A lessee of a farm, who fixes a boundary line between himself and his neighbor, is so far estopped from showing that such line was erroneously settled, that he cannot maintain trespass against his neighbor for taking and carrying away crops put in by him, on the assumption that the line agreed upon between them was the true one. *Dewey v. Bordwell*, 9 Wend. 65.

53. In an action of ejectment to recover possession by a lessor from a lessee, he is estopped to deny the plaintiff's title. *Holmes v. Kennedy*, 1 Root, 77.

54. A lease of a lot of land, for a valuable consideration, received of a society, was executed to E. G., the minister of that society, for the use and benefit of the ministry during the lessor's natural life and his successor's good pleasure; it was held, that the society, not being party to such lease, and having no interest in the land, was not thereby estopped to deny the plaintiff's title. *Merwin v. Camp*, 3 Conn. 35.

55. Held, also, that if the estoppel ever existed, it would have determined upon the termination of the lease by the death of E. G., the lessee. *Ib.*

56. Where it appears, on the face of an instrument called a lease, that the subject of it is a right of dower, the rule, that the lessee or his assignee is estopped to deny the title of his lessor, does not apply; nor is such assignee estopped, by his payment of rent, to deny that he paid it as assignee of the covenant, by statute 1816, c. 84. *Croade v. Ingraham*, 13 Pick. 33.

57. In an action of dower, the tenant is estopped from questioning the seisin of the husband under whom he him-

self has purchased and taken a deed. *English v. Wright*, Coxe, 437.

58. In Pennsylvania, the collateral warranty of the ancestor operates as an estoppel to the heir. *Kesselman v. Old*, 4 Dall. 168.

59. A co-devisee, having conveyed away the land devised in fee, is estopped from becoming a co-plaintiff with the other devisees in an action to try titles against the purchaser to whom he sold. *M'Kinnie v. Littlejohn*, 2 Nott & McCord, 52.

60. A., being tenant in tail of the land in dispute, conveys the same in fee, with a general warranty, to B., who had a title to the land by a warrant and survey under the proprietaries, and who, on such conveyance by A., went into possession, and retained it ever afterwards. In an ejectment, by the issue in tail of A. against B., the latter is not estopped to deny the validity of the plaintiff's title, and to set up his own paramount title against him. Estoppels operate equally and reciprocally. The plaintiff's claiming *per formam doni* cannot be estopped; so neither can the defendant. *Gardner v. Sharp*, 4 Wash. C. C. 609.

61. A tenant for life, purchasing an adverse title without the consent of the reversioner, is estopped, together with his children and all claiming under him or them, from controverting the reversioner's right of possession. *Caufman v. Presbyterian Church*, 6 Binn. 59.

62. A tenant is estopped to dispute the title of his landlord, either by himself or another, during the existence of his lease or tenancy; and the same principle applies to mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of the real estate of another by a recognition of his title. *Willison v. Watkins*, 3 Peters, 43.

63. A tenant is not estopped to prove that, since he entered under another, the land has been decreed to himself. *Swann v. Wilson*, 1 A. K. Marsh. 99.

64. A defendant in ejectment, who had himself conveyed the land to the plaintiff, is estopped to deny that he had title when he conveyed. *Cox v. Lacey*, 3 Litt. 334.

65. A deed to the defendant cannot estop him from deny-

ing the title of the grantor. *Winlock v. Hardy*, 4 Litt. 272.

66. If a person in possession of land be induced, by fraud, to become lessee of one having no claim to the land, he will not be estopped by such lease to deny tenancy. *Ball v. Lively*, 2 J. J. Marsh. 181.

67. A lessee may not deny the title of his lessor; but a contract intended to convey an estate in fee, which wants some legal formality, cannot estop the purchaser while it leaves the seller free to disregard it. *Hughes v. Trustees of Clarksville*, 6 Peters, 369.

(e.) *Pleading and Proof of an Estoppel.*

1. Judgments and decrees, as estoppels, conclude parties and privies only. The grounds on which persons standing in the relation of *privity* to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest; and when this identity is found to exist, all alike are concluded. When, therefore, one binds and obliges that the defendant in an attachment suit would cause the property levied upon and replevied by the said bond, to be forthcoming, to abide the final order of the court in the said suit, he connected himself in *privity* with the proceedings therein, and made the record of the judgment conclusive evidence against him. Whenever the matter of the estoppel is apparent on the face of the record, advantage may be taken thereof by demurrer. *Collins v. Mitchell*, 1 Florida, 364.

2. The Real Estate Bank brought an action on a protested foreign bill of exchange against the acceptor and endorsers, who pleaded *non assumpsit*, but afterwards filed their plea, *puis darien continuance*, that the plaintiff had assigned the bill to certain trustees. Upon a bill in chancery by the trustees, for the recovery of the bill of exchange, held, that the endorsers were not estopped by the plea *puis darien continuance*, in the case at law, from objecting want of notice

of non-payment and protest. *Trustees R. E. Bank v. Boze-man*, 15 Barb. 316.

3. In debt on bond, the defendant pleaded that the same was obtained by false suggestions and misrepresentations by the plaintiff, "as per preamble in the said bond." The plaintiff joined issue as to that fact, which was found against him by the jury. Held, that the plaintiff, by joining issue and not demurring, had waived any estoppel which he might have had to such plea. *Chew v. Moffett*, 6 Munf. 120.

4. In a real action, a disclaimer estops the tenant from denying the title set forth in the demandant's writ. *Prescott v. Hutchinson*, 13 Mass. 439.

5. To pass an estate by estoppel, the party must have a right to pass it by a direct conveyance. *Dougal v. Fryer*, 3 Mis. 40.

6. In an action for mesne profits, after judgment in ejectment for the lessor of the plaintiff, it appeared that the defendant had been made defendant in the ejectment, under section 13 of Stat. 11, Geo. II., chap. 19, upon entering into the consent rule as mortgagee and landlord. Held, that defendant was concluded by the consent rule from denying that he was landlord. *Doe v. Challis*, 6 Eng. Law and Eq. Rep. 249.

7. An estoppel must be reciprocal, and certain to every intent, binding both parties. *Callow v. Jenkinson*, 5 Eng. Law and Eq. Rep. 533.

8. A defendant, in an action of covenant, is estopped from pleading that the contract was entered into for a fraudulent purpose against the government. *Phillpots v. Phillpots*, 1 Eng. Law and Eq. Rep. 339.

9. An estoppel can only be asserted or pleaded by one who was affected by the act which constitutes the estoppel. *Miles v. Miles*, 8 Watts & Serg. 135.

10. Estoppels affect parties to actions for the use of another. *Reddicord v. Hill*, 4 Monroe, 370.

11. A jury is bound by an estoppel, and the court will disregard a finding contrary thereto, except where the party has waived his rights by mispleading. *Bufferlow v. Newsom*, 1 Dev. 208.

12. The state is not bound by an estoppel, nor is a grantee from the state estopped to deny what the state, from whom he claims, is at liberty to assert. *Candler v. Lunsferd*, 4 Dev. & Bat. 407.

13. A party cannot be estopped from pleading the general issue. *Fry v. Cook*, 2 Aik. 342.

14. A party is not estopped from maintaining an action, although it be in violation of an executory covenant. *Gibson v. Gibson*, 15 Mass. 106.

15. After joinders on an issue of fraud in obtaining a discharge, an estoppel cannot be taken advantage of against the party pleading the fraud: an estoppel must be pleaded. *Sawyer v. Hoyt*, 2 Tyler, 288.

16. When the fact which concludes the defendants from making the denial appears in the declaration, the estoppel may be insisted on by a demurrer to the plea, by which the same matter is set up as a defence. *Smith v. Whittaker*, 11 Ill. 417.

17. A party is not barred to prove a just defence, because his evidence tends to prove him guilty of a fraud in relation to a matter on which his defence does not rest. *Wood v. Kirk*, 8 Foster, (N. H.) 324.

18. He who claims a title by estoppel is, as to those estopped, in the constructive possession of the land, and may maintain trespass. *Phelps v. Blount*, 2 Dev. 177.

19. Where evidence is offered of facts which the party is estopped from proving, and no objection is made, the estoppel is waived. *Hanson v. Buckner*, 4 Dana, 251.

20. A party who is in laches cannot complain of the neglect or delay of his adversary, arising from that laches. *Dansen v. Johnson*, 1 Greene, 264.

21. Where the matter which constitutes an estoppel is set up in the declaration, the plaintiff may demur to a plea which attempts to set up the same matter as a defence. But if such matter does not appear on the face of the declaration, the plaintiff must, by a replication, expressly show such matter, and rely thereon. *Smith v. Whittaker*, 11 Ill. 417.

22. An estoppel cannot be taken by inference, but must be relied on in the pleadings. *Lansing v. Montgomery*, 2 Johns. 382.

23. If the matter is not expressly and precisely alleged, it will be no estoppel. *Guild v. Richardson*, 6 Pick. 364.

24. Where a party, relying on matter in estoppel, has no opportunity of pleading it, as a landlord relying on his lease in ejectment, he may give it in evidence with the same effect as if pleaded. *Lord v. Bigelow*, 8 Vt. 461.

25. Where the matter on which an estoppel arises has not appeared in the preceding pleadings, it is unnecessary to plead it specially. *Howard v. Mitchell*, 14 Mass. 241; *Adams v. Barnes*, 17 Mass. 365.

26. In a plea of estoppel, every fact necessary to create the estoppel must be directly and precisely proved, and nothing is to be taken by inference. *Crandall v. Gallup*, 12 Conn. 365.

27. Therefore, where a former decree in chancery, on a bill brought by A., as administrator of the estate of B., was pleaded as an estoppel, and it appeared from the plea that A. claimed to be administrator, and as such brought his bill, and described himself as such throughout, but there was no direct averment that A. was in fact administrator, it was held, that the plea was, for such cause, insufficient. *Id.*

28. A party is not estopped by every averment made by the other side which he does not deny; but only by averment of facts material and traversable, alleged directly and precisely, and not by way of argument, inference or recital. *Adams v. Moore*, 7 Greenleaf, 86.

29. Therefore, where, to an action by the sheriff against a surety on his deputy's official bond, the surety pleaded that on a certain day notice was given to the sheriff, by another surety, that he would no longer be responsible for the official conduct of the deputy, who became insolvent; and that the sheriff still carelessly and fraudulently continued him in office; and that all his defaults happened after such notice; to which the sheriff replied by alleging a breach previous to the notice, without denying or protesting against the other facts alleged, and had judgment upon a general demurrer to the replication; it was held, in a *scire facias* for further execution, that the facts so stated in the plea, and not denied, did not constitute an estoppel, the fraud not being directly

alleged, nor necessarily deducible from the other facts in the plea. *Ib.*

30. An instrument, not under seal, cannot be pleaded by way of estoppel. *Davis v. Tyler*, 18 Johns. 490.

31. The form of pleading an estoppel is to rely on the deed, as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts in the deed, without demanding judgment, *si actio*, &c. *Ib.*

32. A party relying on matter of estoppel must plead it, if he have opportunity. If not, it may be given in evidence under the general issue. *Howard v. Mitchell*, 14 Mass. 241.

33. Though it is generally true, that a party neglecting to plead an estoppel cannot take advantage of it, yet, if the state of the case is such that the party has no opportunity to plead it, he may show it in evidence with the same effect as though he had pleaded it. *Shelton v. Alcox*, 11 Conn. 240.

34. Therefore, where A. brought trespass *quare clausum* against B., to which B. pleaded title in C., under whom he claimed, without showing how C.'s title was derived or when it accrued, it was held, that A. might give in evidence an award against the title of C., without pleading it. *Ib.*

35. In an action for trespass for breaking and entering a warehouse, and taking therefrom certain goods, the defendants pleaded that they took the goods by virtue of legal process, as the property of a third person, and that they broke into the warehouse because they were refused admittance upon demand. The plaintiffs replied that the goods were the property of A., and not of the debtor, as whose they were taken, and that they had received the goods to keep for A. The defendants rejoined, in estoppel, that A. had brought an action of trespass against them for taking and carrying away the same goods, and that issue had been joined in that action upon the question of A.'s title to the goods, and that judgment had been rendered thereon in favor of the defendants. Held, on demurrer to this rejoinder, that the matter was well pleaded as an estoppel, and that the defendants were entitled to judgment. *Burton v. Wilkinson*, 18 Vt. (3 Washb.) 186.

36. When a fact has been directly tried and decided by a

court of competent jurisdiction, it cannot be contested again between the same parties or their privies, in the same or any other court. A judgment of a court of law, or decree in chancery, is an estoppel to the parties thereto and their privies, provided it relates to the same subject matter, and decides the question now in issue. But if that question was before the court only collaterally, and incidentally considered, the judgment or decree is no estoppel. It cannot be ascertained by inference, or by arguing from the former judgment or decree, whether the question now in issue was embraced therein. *Evans v. Birge*, 11 Geo. 265.

37. *Quere*, whether, in Georgia, an estoppel by a judgment or decree must not be specially pleaded. *Ib.*

38. In a contest for town lots, both parties claiming under the trustees, the defendant is estopped to deny the right of the trustees, or to set up an outstanding title. *M'Clain v. Gregg*, 2 A. K. Marsh. 454.

39. If a party, instead of taking advantage of an estoppel by demurrer or plea, takes issue on the matter of estoppel, the estoppel is waived. *Burdit v. Burdit*, 2 A. K. Marsh. 143; *Keel v. Ogden*, 3 Dana, 103.

40. In an action of *assumpsit* on a charter-party made between the defendant, described in the declaration as the owner of the ship, and S., (the plaintiff,) merchant and freighter, for not taking the cargo on board, the plea was *non assumpsit*. The charter-party stated that it was made by the plaintiff as agent for the freighter, and concluded thus: "This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of S. & Co. ceases as soon as the cargo is shipped." At the trial it was proved that the plaintiff was the real freighter. Held, that the plaintiff was entitled to sue as principal, notwithstanding the terms of the charter-party. *Schmalz v. Avery*, 3 Eng. Law and Eq. Rep. 391.

41. A., the mother and guardian of certain minors, in that capacity leased certain real estate, belonging to them, to B. When one of the minors came of age, he sued the administrator of B. in *assumpsit* for use and occupation, and it was held, that as there was no privity between the minors and

B., they could not maintain their action. In an action of trespass by the minors against B., it was held that B. was estopped by his plea in the former case from claiming a priority of contract, and he was adjudged a wrong-doer. *Hardy v. Williams*, 11 Ired. 499.

42. One who is not bound by, cannot take advantage of, an estoppel. *Lansing v. Montgomery*, 2 Johns. 382.

43. It must be reciprocal and certain to every intent. *Bolling v. Mayor*, 3 Rand. 563.

44. In South Carolina, by the act of 1744, if the plaintiff, in an action of trespass to try title, suffers a verdict or judgment against him, or be nonsuited, or discontinue, or otherwise let fall his action, he must, within two years thereafter, commence a second action, or he is after that barred and precluded of his right and title; and the same as against him, is finally and absolutely vested in the defendant. *Dyson v. Leek*, 5 Strobb. 141.

45. Where one of several administrators was present at a levy upon the property of his intestate, and furnished to the officer making the levy a list of the slaves, and was present at the sale and made statements to the bidders, although it did not appear that he acted fraudulently, it was held, that he and the other administrators were estopped from proceeding against the officer as a trespasser. *Camp v. Moseley*, 2 Florida, 171; *Ponder v. Moseley*, 2 Florida, 207.

46. To render a former recovery an estoppel to a subsequent suit, embracing the same matter in controversy with the first, the judgment must be especially pleaded as an estoppel. *Picquet v. M'Kay*, 2 Blackf. 465.

47. A former finding and judgment, set up by way of estoppel, must be on a precise point distinctly put in issue. *Richmond v. Hays*, 2 Penn. 492.

48. As to the manner and form of pleading an estoppel, see *Gray v. Pingry*, 17 Vt. 419.

49. Matter of estoppel, in order to be conclusive, must be pleaded where it can be. If it cannot be pleaded, it may be given in evidence, and in such case it will be equally conclusive. *Isaacs v. Clark*, 12 Vt. 692; *Woodhouse v. Williams*, 3 Dev. 508.

50. But in *Elliott v. Eslava*, 3 Ala. 568, it was held, that if it was offered in evidence, the jury were not precluded from finding the truth of the case.

51. In an action on the judgment of another state, declared on generally with a *prout patet*, if the record be relied on as an estoppel to a plea of want of notice or appearance, it must be pleaded. *Pritchett v. Clark*, 3 Harringt. 241.

52. If, to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for a jury. *James v. Lawrenceburgh Insurance Co.*, 6 Blackf. 525.

53. A party who has been unsuccessful in pleading an estoppel, is not afterwards precluded from confessing and avoiding, or traversing the allegations of his adversary. *Dana v. Bryant*, 1 Gilman, 104; see further, as to pleadings in estoppel. *Ib.*

54. When it is decided that a defendant is not estopped by the record from insisting upon the allegations of his plea, the judgment on the finding should be interlocutory, and not final. *Ib.*

55. If the declarations show that the defendant is estopped to deny the facts contained in his plea, the plaintiff need not reply to the estoppel, but demur. *Trimble v. The State*, 4 Blackf. 435.

56. Where one party read a deed in evidence, signed by certain persons as executors, it was held to operate as an admission that they were such executors, in lieu of proof to that effect by the other party. *Walton v. Newsom*, 1 Humph. 140.

57. If it should be pleaded, where the matter to be concluded appears on the record; *aliter*, where it is introduced on the general issue. *Davis v. Thomas*, 5 Leigh, 1.

58. And if it is not so pleaded, it will be considered as waived. *Brinsmaid v. Mayo*, 9 Vt. 31.

59. Where one is intrusted with personal property he may, in an action of replevin, contest the right of ownership and possession, without a re-delivery of possession. *Gray v. Allen*, 14 Ohio, 58.

60. A recovery in a suit upon an agreement, wherein the right to recover depended, by the pleadings, upon the truth

of the allegation made in the complaint, and denied by the answer, that the plaintiff had fully performed the agreement, as a bar to an action brought subsequently by the defendant in the first writ against the defendant thereon, to recover damages for the alleged non-performance of the same agreement. *Davis and another v. Vallcot*, 2 Kernan, 184.

61. The record of the recovery estops the defendant from controverting that the plaintiff therein fully performed the contract. *Id.*

(f.) *General Principles of Estoppels.*

1. If the real owner of land permits another to remain the legal and ostensible actual owner of land, he is not thereby estopped to claim such land, as against the creditors of him having the legal title. *Ludwig v. Highley*, 5 Barr, 132.

2. The government of the United States is not ordinarily bound by an estoppel. *Johnson v. United States*, 5 Mason, 425. But a state may be estopped by the acts of its legislature. *Endfield v. Permit*, 5 N. H. 280.

3. Whenever the application of the doctrine of estoppel would be likely to defeat the principle upon which it rests, to effect justice and prevent wrong, it becomes the duty of the courts to prevent its application. *Black v. Tucker*, 12 Vt. 44.

4. It is considered that every person is acquainted with the law, both civil and criminal, and no one can, therefore, complain of the misrepresentations of another respecting it. *Platt v. Scott*, 6 Blackf. 389.

5. A resolve of the commonwealth, fixing the boundaries of certain lands, estops the commonwealth from denying those boundaries. *Commonwealth v. Pejepscut Proprietors*, 10 Mass. 155.

6. Estoppel does not lie against the sovereign power. Thus it is competent for the state, succeeding to the royal rights, to show that nothing passed by the king's grant of lands which he had previously granted to another. *Taylor v. Shufford*, 4 Hawks, 116.

7. A stranger is not bound by, nor can he take advantage of, an estoppel. *Massure v. Noble*, 11 Ill. 531.

8. One who knowingly and silently permits another to spend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right. *Godefroy v. Caldwell*, 2 Cal. 489.

9. Where parties enter into possession under a compromise, and occupy and enjoy according to the terms of it for eleven years, they cannot afterwards repudiate it. *Washburn v. Washburn*, 4 Ired. (Eq.) 306.

10. Where one person, by his words or conduct, causes another to believe in the existence of a certain state of things, and thus induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time. *Roe v. Jerome*, 18 Conn. 138; *Middletown Bank v. Jerome*, 18 Conn. 443.

11. A. gave a slave to his granddaughter by parol, and she being an infant, the slave was delivered by A. to the father of the donee, by whom it was kept, and was always acknowledged and claimed by him to be the property of his daughter. The father finally sold the slave to B., who had been a witness to the gift by A. Held, that the father of the donee and his grantee were both estopped to deny that the slave was the property of A.'s donee. *Tarkinton v. Latham*, 11 Ired. 596.

12. Where a person, whose signature is forged to a promissory note, upon being asked by one, who afterwards purchases it, if he shall purchase, and tells him that he may, or where, after purchase, when the note falls due, he promises to settle it, he cannot afterwards excuse himself from paying it, on the ground that it is a forgery. *Crout v. De Wolf*, 1 R. I. 393.

13. If a person, whose signature is forged, treats the forged notes as valid, and thereby leads the community to believe that the forger has authority to draw notes in his name, he will be bound to pay similar notes, purchased by one who is deceived by his conduct. *Id.*

14. Where the person, whose signature is forged, promises

the forger to pay the note, this amounts to a ratification of the signature, and binds him. *Ib.*

15. Where a bill for petition recited that certain property belonged to A. and B., his wife, in her own right, and the decree followed the language of the bill, it was held, that A. was not estopped to show that the fee was in himself, where these pleadings were set up as an estoppel in another suit. *Meriam v. Harsen*, 4 Edw. (Ch.) 70.

16. If the owner of land, knowing that a dam, which was being built, would cause his land to be overflowed, was present several times during its construction, worked on it for the builder, making repairs, knew that the intention was to keep up the water during the whole year, said to third persons that the mill would be a benefit to the neighborhood, urged the workmen to make the dam tight, and did not, as appeared in evidence, forbid the builder to proceed with the work, these facts will not alone prevent him from maintaining a suit for damages. *Batchelder v. Sanborn*, 4 Foster, (N. H.) 474.

17. If one, having the legal title to land, induces another to purchase it under execution against him, he is not thereby estopped, in a court of law, from showing that the sale was void, and passed nothing to the purchaser. *Smith v. Mundy*, 18 Ala. 182.

18. If the owner knowingly stand by at the sale of his property by another, without objecting, he will be precluded from contesting his claim. *Wills v. Prince*, 7 Foster, (N. H.) 503.

19. A party is not estopped by his admission or assertion of a conclusion of law. *Bunsten v. Striker*, 2 Comst. 19.

20. One who, after the lien of a judgment had expired, purchases land previously bound thereby, and who is subsequently notified on *scire facias* to appear and defend, and fails so to do, is not thereby estopped from setting up his title to the land. *Dengler v. Kiehner*, 13 Penn. State R. (1 Harris,) 38.

21. In the trial of a cause it is competent for either party to prove, by parol testimony, that the precise question in dispute was decided in a previous action between the same

parties, and thus create an estoppel. *Rogers v. Libbey*, 35 Maine, (5 Red.) 200.

22. Where a judgment or decree of the District Court of Texas, which was rendered after the court had obtained jurisdiction of the parties, purports to have been entered by consent, the parties, and those claiming under them, are estopped from denying that they consented to it, in the absence of an allegation of fraud. *Cannon v. Hemphill*, 7 Texas, 184.

23. The general rule is, that an individual who acts in ignorance of his rights, shall not be prejudiced thereby. *Lewis v. San Antonio*, 7 Texas, 288.

24. If a married woman voluntarily makes admissions and representations in respect to her rights of property, which deceive others, and induce them to give credit to her husband on the faith of the property, she will be precluded from asserting her claim against the rights of those who have trusted in and acted upon her admissions and representations. *Cravens v. Booth*, 8 Texas, 243.

25. If a person enters into a covenant to pay for personal property, the possession of which he acknowledges to have received, he will be estopped to deny the receipt of it, because it is a fact which he must have known. But if he recite that the vendor had title, he may, notwithstanding, show the contrary; because it is apparent that this allegation must have come from the vendor, and that the vendee could not otherwise have known its truth. *Miller v. Bagwell*, 3 M'Cord, 429.

26. A covenant, expressed by way of recital, is as obligatory as if expressed in the body of the agreement. *Bealle's Adm'r v. Shoal's Ex'r*, 1 A. K. Marsh. 475.

27. If separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on a trial of a plea to the merits, which would enure to the benefit of both defendants if sued jointly, such judgment is not an estoppel against the plaintiff, if pleaded by the surety in bar of the action against him. *State Bank v. Robinson*, 8 Eng. (13 Ark.) 214.

28. From the mere fact that A. has "suffered and per-

mitted" B. "to use and control a slave as his own property," he is not estopped from thereafter claiming the slave as his own, though the slave has been sold as the property of B. *McDermot v. Barnum*, 16 Mis. (1 Bennett,) 114.

29. B. having endorsed a note made by A., for A.'s benefit, A. mortgaged certain goods to B., for his security, which B. took into his possession. C., an officer, then attached these goods, in a suit brought by D., a creditor of A., and took them out of B.'s possession, and afterwards sold them at the post. The note endorsed by B. having become the property of a bank, B. caused a suit to be brought thereon, in the name of the bank, against A., by writ of attachment, which B. put into the hands of C., directing him to attach the same goods, subject to the former attachment. In a suit afterwards brought by B. against C. for taking the goods on such former attachment, it was held, 1. That the mortgage made by A. to B., (having been found to be *bona fide* and valid,) the conduct of B., in regard to the suit brought by him, in the name of the bank, against C., did not affect B.'s rights under his mortgage; nor, 2. Estop him from a recovery against C., for taking the goods on the first attachment. *Dyer v. Cady*, 20 Conn. 563.

30. A. having a judgment and execution against B., sent an agent to inquire of C. who the owner was of a horse in C.'s possession, and the agent, without disclosing his agency and purpose, or stating that he had any interest in knowing whose the horse was, made the inquiry of C., who told him the horse belonged to B. A. subsequently ordered the horse to be seized, and an officer thereupon seized and sold the horse, on A.'s execution against B. When the horse was thus seized, C. told the officer that the horse was his, and forbid the sale. Held, in an action of trespass by C. against the officer, that C. was not estopped to show that the horse was his property. *Pierce v. Andrews*, 6 Cush. 4.

31. Where a creditor is advised by his debtor and a third party, that the two are in treaty for a transfer to such third party, for a valuable consideration, of the debtor's property, and is not informed that by such transfer he is to deprive himself of the means of securing his debts, and being required

by them to declare whether he had any claim against the debtor or the property in question, declined to answer, it was held, that the creditor is not, by his silence, estopped from seeking relief against the transfer. *Cicotte v. Gagnier*, 2 Mich. (Gibbs,) 381.

32. Where the owner is informed of the sale of his property by another, on credit, and does not object to it, or give the purchaser notice of his rights, but lies by and permits such purchaser to pay the purchase-money as it becomes due, to the vendor, and receives the whole or a portion of it from the vendor, he will be held to have sanctioned the sale, and will not be permitted to assert his title against the purchaser. *Brewster v. Baker*, 16 Barb. 613.

33. Where land was surveyed with a view to partition among heirs, and the heirs conveyed the land according to the boundaries of such survey, and the husband of one of the heirs afterwards purchased an adjoining lot, which included a portion of the survey, it was held, that the heirs were estopped to deny the boundaries so fixed, and that the husband was estopped to claim so much of the land surveyed as was included in the deed to him. *Root v. Crock*, 7 Barr, 378.

34. A. agreed with B. and C. to sell them bank stock within a certain time. Subsequently, in a conversation with B., A. stated that D. had offered to purchase the stock. B. made no objection, but said that he (A.) must do as he thought best, that he (B.) could not advise him. A. sold to D. In an action on the contract, by B. and C. against A., for damages, it was held that B., because he did not assert his rights under the contract in his conversation with A., was not estopped from prosecuting a suit upon the contract; and that whether the facts proved showed a new contract between A. and B., rescinding the first and consenting to a sale to D., was a question for the jury. *Martin v. Angell*, 7 Barb. Sup. Ct. 407.

35. A husband claiming an owelty previously awarded to his wife on a partition, as her administrator, as against judgment creditors of the persons to whom the land was set off, is not estopped by proof of his declarations that he would

not claim it, there being no proof that such creditors were misled by his declarations. *Darlington's Appropriation*, 13 Penn. State R. (1 Harris,) 430.

36. Where a person received the legal title of land for the benefit of certain creditors of the owner thereof, he cannot afterwards set up any title which would affect the trust. *Paull v. Oliphant*, 14 Penn. State R. (2 Harris,) 342.

37. A legatee who has prayed the orphans' court to re-commit a report to an auditor, cannot afterwards object that the auditor was originally improperly appointed on motion of the executor. *Ludlam's Estate*, 13 Penn. State R. (1 Harris,) 188.

38. A widow, continuing in possession of land, is estopped to deny the title derived under her husband's deed. *Grandy v. Bailey*, 13 Ired. 221.

39. The owner of a tract of land purchased at the Cherokee sales is estopped to deny the right of one who has bought at a sale under an execution against him, though such purchaser at the Cherokee sales has not yet paid the state, and therefore has acquired no legal title. *Hunsucker v. Tipton*, 13 Ired. 481.

40. If a person accepts a beneficial interest under a will, he thereby bars himself from setting up a claim which will prevent its full operation. *Smith v. Guild*, 34 Maine, (4 Red.) 443.

41. Estoppels, to be available, where there is more than one party, must be mutual, and can only operate upon the parties to the issue, and those who stand in privity of estate or descent. *Wright v. Hazen*, 24 Vt. (1 Deane,) 143.

42. Any title subsequently acquired by the grantor, who conveys by warranty, will enure to the benefit of the grantee. But grants made by the grantor on conditions or limitations, or estoppels subsequently attempted to be annexed to the estate, will not affect his grantee. *Pope v. Henry*, 24 Vt. (1 Deane,) 560.

43. A party against whom a judgment is rendered in a real action, he having then only an equitable title, is not estopped thereby if he afterwards acquires the legal title. *Brown v. Roberts*, 4 Foster, (N. H.) 131.

44. If, on a note, B. is principal, and C. and W. sureties

for B., and W. surety also for C., and A. delivers to C. money sufficient to pay the note, part of which came into the possession of W.; and in a reference agreed on, between B. on one side and C. and W. on the other, C. and W. claimed and were allowed a credit in their favor against B. for the amount paid on the note; W. will be estopped from setting up, in a suit between him and C., a claim that he paid the note with his own money. *Id.*

45. Where a note was made by five joint trustees, and a mortgage of the joint trust property was given to secure the note, purporting to convey the whole estate, but signed by only four of the trustees, although drawn in the name of all, and it appeared, from the circumstances, that the other trustee must have known of the transaction, and that he never made any objection to it, it was held, that the mortgage was binding upon him by an equitable estoppel, and that the purchaser of the equity of redemption of the mortgagors at a sheriff's sale was also bound by it. *State Bank v. Campbell*, 2 Rich. (Eq.) 179.

46. It is a well-established, just and salutary principle, that where one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is precluded from averring a different state of things as existing at the time. *Cowles v. Bacon*, 21 Conn. 451.

47. The declarations of a party, in order to estop him as to a third person, in relation to his ownership of property, must be made to one who has a right to know the relations of the party to the property in question. *Sullivan v. Park*, 33 Maine, (3 Red.) 438.

48. If the owner of property, with full knowledge of his title, stands by and permits it to be sold to an innocent purchaser, without making known his title, he will be equitably estopped to assert his claim against such purchaser; but such estoppel can be availed of in equity only and not at law. *Danley v. Rector*, 5 Eng. 211.

49. In an action to recover the sum awarded by commissioners appointed by the parties to divide real estate, to be

paid by the defendant, he cannot set up in defence that his wife, whom he had induced to become a party to the division, was at the time an infant, as it would be allowing him to take advantage of his own fraud. *Ridgeley v. Crandall*, 4 Md. 435.

50. One who conveys land without having a title, is estopped from claiming it if he afterwards acquires a title. *Brown v. M'Cormick*, 6 Watts, 60; *Reeder v. Craig*, 3 M'Cord, 411. His heirs are also estopped. *M'Williams v. Nisly*, 2 Serg. & Rawle, 507.

51. An allegation in a writ cannot operate as an estoppel, when the judgment recovered is no muniment of title, and the party insisting on the estoppel is not a party to the judgment. *Sheldon v. White*, 35 Maine, (5 Red.) 233.

52. A person who has ordered articles to be made for him, and refused to receive them without assigning any reason, is not precluded, by his silence, from assigning any reason, on trial of an action against him. *Newmarket Iron Foundry v. Harvey*, 3 Foster, (N. H.) 395.

53. Admissions or declarations, which have not been acted on by another, nor been productive of injury to him, do not estop the party making them from showing the truth to be otherwise. *Carter v. Derby*, 15 Ala. 696.

54. The mayor of a city, who, under the authority of an order of the Board of Aldermen, which they had no power to pass, has granted a license for the moving of a building through the streets, is not estopped, in an action of trespass against him for removing the building out of the street, where it has been left by the owner in the course of such removal, to set up the invalidity of the license. *Day v. Green*, 4 Cush. 433.

55. In an action of trespass against an officer for taking and carrying away goods, which he has attached and claims to hold as the property of the plaintiff, the officer is not estopped to deny the property of the plaintiff in the goods. *Roberts v. Wentworth*, 5 Cush. 192.

56. One who does not derive title by conveyance, directly or indirectly, from the husband of the demandant or his heirs, is not estopped from denying the seisin of the husband. *Edmondson v. Montague*, 14 Ala. 370.

57. One in possession of lands, and against whom dower is asserted by the widow, is not estopped from showing that the equity of the husband was imperfect because a bond or title to the lands, which was once held by the husband, has come to his possession. *Ib.*

58. Estoppels must bind both parties, or they bind neither; and when the defendant takes nothing by the husband's deed, he is not estopped from showing the truth in answer to the claim for dower. *Ib.*

59. In equity, a party is not estopped by his acts or admissions, except in cases where, in good conscience and honest dealing, he should not be permitted to gainsay them. *Ib.*

60. A recital, to amount to an estoppel, must come from the party to be estopped, and not from his opponent. *Miller v. Bagwell*, 3 M'Cord, 429.

61. A party cannot set up a title adverse to that under which he acquired the possession, nor can those claiming under him. *Chiles v. Jones*, 4 Dana, 479; *Miller v. Shackelford*, 4 Dana, 264.

62. Where both parties claim under the same person, they are privies in estate, and cannot, as such, deny his title. *Murphy v. Barnett*, 2 Murph. 251.

63. In some cases, where the recital points to higher evidence in the power of the party producing it, the withholding of which awakens a suspicion of intended fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him. Thus, where the question was, as to what sum, if any, was due upon a bond, to secure which a mortgage had been given, though the mortgage recited the bond, yet held, that the latter must be produced. *Chewning v. Proctor*, 2 M'Cord, 11, 14.

64. Estoppels are not to be favored. *Owen v. Bartholomew*, 9 Pick. 520.

65. Where a party, who has title to land by an unrecorded deed, makes himself instrumental in causing another to purchase the same from a third person, he will be estopped from setting up his title as against such purchasers. *Matthews v. Light*, 32 Maine, (2 Red.) 305.

66. A person who has subscribed for a share in a corporation, has addressed petitions to the directors of the corporation by that name, and has acted, at a meeting of the members, on a committee to report by-laws for the corporation, is estopped to deny the existence of the corporation in a suit brought by it against him for an assessment. *South Bay Meadow Dam Co. v. Gray*, 30 Maine, (17 Shep.) 547.

67. Where a person petitioned for a commission, under the act of congress of 1803, for a confirmation of a British grant, and represented himself as "the only surviving heir and legal representative" of the grantee, such petitioner is estopped from claiming as tenant by the curtesy. *Montgomery v. Ives*, 13 S. & M. 161.

68. The claimants of the same lands under two grants submitted them to the commission under an act of congress, to carry a cession into effect. Held, that they thereby acknowledged their claim to be subordinate to such act of cession, and were estopped from claiming above it. *Ib.*

69. A. and B. were partners. The goods of C., in the hands of A., were sold on an execution against the firm, (A. giving notice that the goods belonged to C.,) and were bought by B., who, after paying the sheriff, finding that the goods were C.'s, paid C. for them, and took a transfer to himself. Held, that in an account rendered between A. and B., the latter was entitled to a credit for what he had paid the sheriff, and was not estopped from claiming it because he directed the sheriff to seize the goods as A.'s, and bought them as such, and they were returned as such in the writ. *Patterson v. Lytle*, 11 Penn. State R. (1 Jones,) 53.

70. Where a debtor had given notes and a chattel mortgage, and afterwards confessed a judgment for the same debt, and for a further demand due to another creditor, and it was agreed that the judgment should be collateral to the notes and mortgage, and the plaintiff caused an execution to be issued, and the property embraced in the mortgage was sold upon that and a prior execution in favor of another party, it was held, that the first mentioned creditor could not, after this, assert title under the chattel mortgage against the par-

ties acting under the prior execution. *Butler v. Miller*, 5 Denio, 159.

71. A person who petitions the legislature for a grant of land, stated by him to be vacant, and accepts a grant, is estopped to deny that it was vacant. *Tubbs v. Lynch*, 4 Harringt. 521.

72. Where a person, at a receiver's sale of real estate, represented, or induced the receiver to represent, that the property was incumbered greatly beyond its utmost value, and that he who purchased would acquire only the right to the use of the property until a legal title could be perfected under the incumbrances, by means of which representations all competition was prevented, and such person purchased the property at a merely nominal price, it was held, that he was concluded by the representations made by him, and estopped from denying that the judgments mentioned at the receiver's sale were then existing liens upon the land purchased by him. *Chautauque County Bank v. White*, 6 Barb. Sup. Ct. 589.

73. To a bill in equity filed to redeem mortgaged real estate, the defendants answered, that the plaintiffs had no right to redeem. The plaintiffs claimed title to the premises by virtue of an execution levied on the same as the property of B., a brother of the mortgagor. The principal question in the case was, whether any title passed by the levy. The facts were as follows: B., claiming some interest in the land, conveyed to certain purchasers a few small pieces of it. Subsequently, an execution (under which the plaintiffs claimed) was levied upon a supposed life interest of B. in the premises, by his creditors, who then brought an action against him for possession and mesne profits, in which they prevailed. During the pendency of that suit, the mortgagor conveyed to the said purchasers the small pieces before mentioned, and also conveyed to B. the remainder of the mortgaged premises, taking back from him a mortgage of part of the estate so conveyed. The bill was filed against the mortgagor, the original mortgagees, B., and the persons claiming the small lots under him. It having been decided that two deeds, upon which B.'s title, previous to the levy, rested,

had not been given by the mortgagor, the court further held, that the defendants, with the exception of B., were not estopped by the judgment against him for mesne profits from denying his title to the land at the time when the suit was commenced, and that the plaintiffs' title to redeem was not established. *Jackson v. Myrick*, 29 Maine, (16 Shep.) 490.

74. A party having sold and taken pay for an article as his sole property, and having thereby impliedly warranted such a title, is estopped to show a different title. *Starr v. Anderson*, 19 Conn. 338.

75. Where A., being seised of premises in fee, by mistake supposed that he was seised as a tenant in common with others, and applied to the orphans' court, (whose power was limited only to severance of possession, that court not having power to convey title,) and on his petition, stating that he was so seised a tenant in common, a partition was had, and afterwards one of the other alleged tenants in common conveyed the portion assigned to him to B., and after A.'s death, his heirs brought ejectment against B., it was held, that they were not estopped from recovering by the proceedings in the orphans' court. *Den v. Baldwin*, 1 N. J. 395.

76. The fact that the plaintiffs brought the action upon which the judgment was obtained in the foreign state does not estop them from denying its validity in the state of Maine. *Middlesex Bank v. Butman*, 29 Maine, (16 Shep.) 19.

77. A recital in a will that the testator has executed a deed of certain premises to one of his sons, is evidence of a perfect execution of such deed, and that the grantee has the title to the premises, so as to bar an action of ejectment brought by one of the heirs of the testator, for the recovery of an undivided portion of such premises. *Smith v. Wait*, 4 Barb. Sup. Ct. 28.

78. An estoppel must be reciprocal, and a stranger can neither take advantage of, nor be bound by, the estoppel. *Averill v. Wilson*, 4 Barb. Sup. Ct. 180.

79. An estoppel *in pais* is never allowed to be used as an instrument of fraud, but only to prevent injustice. *Pierrepoint v. Barnard*, 5 Barb. Sup. Ct. 364.

80. Although an owner of a slave stands by and sees the

slave sold by another, who has no title, and the owner makes no objection, yet he is not thereby estopped from afterwards asserting his legal title; especially where he was guilty of no fraud upon the purchaser. *West v. Tilghman*, 9 Ired. 163.

81. Although at law, as well as in equity, where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; yet several things are essential to be made out in order to the operation of the rule, viz: 1. That the act or declaration of the person must be willful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; 2. He must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation is untrue; and, 3. The other must appear to have changed his position by reason of such inducement. *Copeland v. Copeland*, 28 Maine, (15 Shep.) 525.

82. A party is not estopped by his admission or assertion of a conclusion of law upon undisputed facts. *Brewster v. Striker*, 2 Comst. 19.

83. Where, in an action on a policy, issued by a mutual insurance company, the insurers defended on the ground of a false warranty, in that the insured, in his application, which was made a part of the policy, had untruly stated that there were no buildings within ten rods of the buildings insured, but the insurers, with a knowledge of the loss and of the inaccuracy of the statement, had afterwards made assessments on the premium note given by the insured, which he had paid, it was held, that the insurers were estopped by these facts from setting up the warranty, and were liable for the loss. *Frost v. Saratoga Mutual Ins. Co.*, 5 Denio, 154.

84. A party who has, either expressly or by his acts and conduct, waived his claim or title to property, will be estopped from asserting it against a party who has acted on the faith of such waiver; but evidence of positive fraud is not

required to charge a party with his admissions. *Cox v. Buck*, 3 Strobb. 367.

85. In an action of trespass for taking timber, the title to the land from which it was taken was the question in the case. The title of the party under whom the plaintiffs claimed was acquired by attachment and levy of execution upon the land as the property of the defendant in 1836. The land had formerly belonged to the defendant, and had been sold for payment of taxes, in 1816, to a person of whom he had purchased it again in 1840. Held, that as the defendant had no title to the land at the time when it was sold upon the execution against him, he was not estopped from setting up and asserting a subsequently acquired title to the premises. *Freeman v. Thayer*, 29 Maine, (16 Shep.) 369.

86. Where the payee of a note, which was usurious, had the possession and apparent ownership of the note, and endorsed and negotiated the same to the plaintiff, saying that it was a valid business note, it was held, that these facts alone were not sufficient to estop such endorser from setting up the defence that the note was void for usury, but that if the plaintiff confided in such statements of the endorser, and took the note on the strength of the same, the endorser was estopped from setting up such defence. *Truscott v. Robinson*, 4 Barb. Sup. Ct. 495.

87. Where a person, *sui juris*, takes a balance from the sheriff, being the proceeds of a sale of lands, such person is estopped from denying that he was a party to the action which resulted in the sale. *Wilkins v. Anderson*, 11 Penn. State R. (1 Jones,) 399.

88. The maker of a promissory note is estopped from setting up, in an action upon the note, that the name of the payee mentioned therein is not his proper name. *Davis v. David*, 1 Iowa, (Greene,) 427.

89. Where an agreement made by attorney has been acted upon by the party for several years, he will not be allowed to say that it is not the agreement which he authorized his attorney to make. *Wakeman v. Jones*, 1 Smith, 308.

90. A. and B., owners of adjoining land, intending to establish the divisional according to the true boundary,

agreed by parol on a line that did not conform to such boundary, and afterwards held possession according to such conventional line. B. sold his land to C. Before the sale, A. stated to C. that the land which he (A.) claimed was bounded by said conventional line between him and B., and that he did not claim beyond that line. After the sale to C., he made improvements on the land next to such conventional line, with the knowledge of A., who was often present, and pointed out said line, without expressing any dissent to C.'s proceedings, or giving notice that he had any claim to said land. A. afterwards discovered that said conventional line was not the true dividing line, and that C. was in possession, as B. had been, of a piece of land which, according to the true line, belonged to him, (A.,) and he therefore brought a writ of entry against C. to recover the land between the true line and said conventional line. Held, that A. was not estopped to claim this land of C., as A. had acted under a mere mistake, without fraud or gross negligence. *Brewer v. Boston and Worcester Rail-Road Corporation*, 5 Met. 478.

91. Where owners of adjoining lands, intending to establish the divisional line according to the true boundary, agree by parol on a line that does not conform to such boundary, and afterwards hold possession according to such conventional line, such agreement so made by mistake, and the possession under it, do not estop the party who has suffered by the mistake from asserting his title to the land that lies between the true boundary line and such conventional line, and recovering the same in a real action, seasonably brought, especially if the tenant in such action has not made improvements on the demanded premises of a greater value than the lands without the improvements, and for which he is not entitled to recover of the demandant. *Tolman v. Sparhawk*, 5 Met. 469.

92. A person is always estopped from denying the truth of a fact, upon the faith of which he has suffered another person to act, knowing at the time that the other's conduct was materially influenced by a reliance upon the truth of such fact. *Hicks v. Cram*, 17 Vt. 449.

93. If a party, having knowledge that he has a title to property, stands by and sees another mortgage it to a third person, to secure a debt or liability incurred at the time, without giving notice of his title, he is estopped from setting it up afterwards, in a suit at law against the mortgagee. *Thompson v. Sanborn*, 11 N. H. 201.

94. And it will not avail him to show that the other property included in the mortgage is sufficient to pay the debt for which it is mortgaged. *Id.*

95. If a part of the debt, to secure which the property is mortgaged, was incurred at a prior time, and a prior mortgage of the same property was executed to secure that part, of which the party claiming the property had no knowledge, it will not affect the case. *Id.*

96. A party is estopped to deny what he declared in bad faith to the disadvantage of his adversary. *Crockett v. Lashbrook*, 5 Monroe, 530.

97. Where, by agreement in writing, one party is to give a bill of sale of a ship by a certain day, and a subsequent credit for the payment of the price, a bill of sale given pursuant to the agreement, in which is an acknowledgment of payment of the consideration money, does not estop the vendor to recover the price in an action on the contract. *Marshall v. Smith*, 3 Shep. 17.

98. A legatee, being executrix, by proving a will and accepting a bequest under it, is thereby equitably estopped to assert a claim in hostility to other provisions of the will. *Benedict v. Montgomery*, 7 Watts & Serg. 238.

99. No estoppel, in relation to real estate, is created by verbal contracts or admissions. *Hamlin v. Hamlin*, 1 App. 141.

100. If the defendant makes a note payable to the plaintiff generally, he is estopped to set up in defence that the plaintiff was only the agent for others in whom is the beneficial interest. *Grigsby v. Nance*, 3 Ala. 347.

101. A., the holder of a promissory note of B.'s, being about to transfer it to C. for a valuable consideration, and this being known to B., he promised to pay the debt to C., who was thus induced to take the note. In a suit upon the note,

in the name of A. for the benefit of C., the maker plead the general issue, and on the trial offered proof that he had paid it to A. before the transfer to C.; and, to repel such defence, C. offered proof of B.'s promise to pay the debt to him. Held, that the evidence was inadmissible, and that B.'s promise estopped him from alleging payment to A. before the assigningment. *Davis v. Thomas*, 5 Leigh, 1.

102. If the owner of property is present when it is levied on as the property of another, and makes no objection, and sets up no claim at the time, this does not estop him from setting up his claim, as provided by statute in case of a claim by a third person to property levied on. *Irwin v. Morell*, Dudley, (Geo.) 72; *Roe v. Neal*, Ib. 168.

103. And if he does not set up his claim under the statute, but publicly asserts his title and forbids the sale on the day of the sale, he may recover the property of the purchaser. *Irwin v. Morell*, Dudley, (Geo.) 72.

104. *Aliter*, if, with knowledge of the levy, &c., the claimant does not interpose his claim until after the sale. *Ib.*

105. A tenant in common is not estopped, by the admission of a co-tenancy, from setting up a better title in himself and others. *Washington v. Conrad*, 2 Humph. 562.

106. Where a tenant in common of several lots directs one of them to be sold under an execution against a co-tenant, he cannot afterwards assert his claim to the lot. *Walker v. Bernard*, C. & N. 82.

107. Whether the rule in equity obtains at law, that one who encourages another to purchase land to which the former has a title, and who purchases the land, the owner not disclosing his title, is estopped from asserting any title to the land, whether he fraudulently conceals his title or is ignorant of it, *quere?* *Marshall v. Pierce*, 12 N. H. 127.

108. But the owner is not thus estopped by witnessing a deed which he supposed conveyed the land, when, in fact, it was not conveyed by the deed. *Ib.*

109. Where a party has so conducted himself as wittingly and willingly to lead another into the belief of a fact, whereby he would be injured if the fact were not so apprehended, the person inducing the belief will be estopped from denying

it to the injury of such other person. *Rangeley v. Spring*, 8 Shep. 130.

110. One who accepts part of the purchase-money arising from a sheriff's sale of real estate is estopped from denying the validity of the sale. *Stroble v. Smith*, 8 Watts, 280.

111. If a settler, entitled by improvement to four hundred acres of land, gives to one purchasing, one hundred and eighty acres thereof, from a third person, a written statement that he had no right to the improvement, though this right be an estoppel as to the one hundred and eighty acres, yet it cannot be used as such by one claiming the remainder without any considerations paid the settler, or evidence that a purchaser was deceived by it so as to purchase or expend money on the fourth of it. *Miller v. Cresson*, 5 Watts & Serg. 284.

112. A party is estopped to deny his own acts and admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of the latter. *Bank v. Wollaston*, 3 Harringt. 90.

113. Declaring a note to be "good," to one about to purchase it, or standing by him in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor. *Watson v. M'Laren*, 19 Wend. 557; *Petrie v. Feeter*, 21 Wend. 172.

114. If A., having title to land, stands by and encourages a sale to B., he may possibly be estopped to maintain title in a court of law; but only where he conceals an outstanding title not equally known to both parties. *Parker v. Barker*, 2 Met. 423.

115. Goods were attached as the property of A.; B. knowing all the facts relating to his own title to the goods, gave the attaching officer a receipt therefor, and a promise to deliver them on demand, and gave no notice that he claimed them as his own. When the goods were attached and the receipt given, there were other sufficient goods of A., which the officer would have attached, if B. had claimed those which were attached, and had refused to give the receipt. Held, in an action against B., on his receipt, that his conduct should operate in the nature of an estoppel, and prevent

him from controverting A.'s title to the goods. *Dewey v. Field*, 4 Met. 381.

116. Where a debtor admits to a third person an existing balance due from him on a bond or other chose in action, upon which such person takes an assignment of the bond, the debtor, in a suit subsequently brought for the recovery of such balance, is estopped from showing a claim against the original creditor, to reduce the amount of the recovery, although the assignment was taken for a precedent debt. *Foster v. Newland*, 21 Wend. 94.

117. A plaintiff in ejectment, having shown that he claims under the same title with the defendant, is not thereby estopped from showing the truth of his case, though it may conflict with his prior evidence. *Zeigler v. Hartz*, 8 Watts, 380.

118. If the owner of an undivided share of goods direct an officer to attach the whole at the suit of himself and others, without knowing at the time that he had any interest therein, he is not thereby precluded from recovering the value from the officer. *Steele v. Putney*, 3 Shep. 327.

119. Nor, after such knowledge, is he, by consenting to the sale of the goods by the officer on the writ, estopped to show that he is the owner of a share in the goods. *Ib.*

120. In such case, he cannot recover against the officer the proceeds of the sale of his share, without a previous demand. *Ib.*

121. It is a question of law for the court, whether a party demanding and receiving from an adjoining landholder the payment of money, towards laying down water-pipes in an alley, is estopped from denying a subsequent purchaser's right to the alley. Whether the facts raise a presumption of a grant is for the jury. *Lewis v. Carstairs*, 5 Watts & Serg. 205.

122. Where a claimant to land sold on execution gives notice at the sheriff's sale that the defendant has not title to the land, and such claimant afterwards becomes the purchaser, he is not thereby estopped to set up the title thus purchased, to protect himself from an action of trespass *qu. cl. fr.* *Porter v. M'Ginnis*, 6 Watts & Serg. 502.

123. A person, by purchasing land at a sale on execution,

is not estopped to deny the defendant's title as against any but the plaintiff in execution. If, therefore, he purchased for a sum more than sufficient to satisfy the plaintiff's execution as against other creditors, he may insist upon his right to the excess. *Wheeler v. Kennedy*, 1 Ala. 292.

124. The widow of the deceased occupant of land is not estopped from setting up a title in herself by her own possession, by the fact that her husband, in his lifetime, acknowledged that he held under another. *Giles v. Pratt*, Dud. (S. C.) 54.

125. If a sheriff sell land by request of the defendant in the execution, such defendant is estopped to resist the recovery of the possession by one holding the sheriff's deed, on the ground that at the time of the sale he held an equitable title only, which was not subject to sale. *Reid v. Heasley*, 2 B. Mon. 254.

126. To enable a plaintiff to recover a debt barred by a former recovery, the debt must not only be acknowledged, but there must be a distinct promise made to pay it. *Auspack v. Brown*, 7 Watts, 139.

127. The establishment of a town by the legislature, and an investiture of the lands in trustees, having been procured by the owner of the land, he and those claiming under him are estopped to deny his title at the time, and the title passes thereby to the trustees. *Coleman v. Morrison*, 1 A. K. Marsh. 406.

128. The action of estoppel applies to a state as well as to private individuals. Where, therefore, a state, by an act of its legislature, granted to a town, for ever, the use of certain lands for the benefit of the town, it was held that the state, having parted with all the interest it had in the lands, was estopped from claiming a forfeiture, by reason of a condition broken before the grant was made. *Vermont v. Society for the Propagation of the Gospel*, 2 Paine, 546.

129. A man is said to be estopped when he has done some act which the policy of the law will not permit him to deny. Yet no one shall be denied setting up the truth, unless it is a plain and clear contradiction to his former allegations and acts. *Pelletown v. Jackson*, 11 Wend. 117.

130. As the effect of an estoppel may be to shut out the real truth by its artificial *representative*, estoppels, whether at law or in equity, are not to be favored or extended by construction. *Jones v. Saper*, 1 Dev. & Bat. 464.

131. The very definition of an estoppel is where an admission is intended to lead and does lead a man, with whom a party is dealing, into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. Per Justice COWEN, 3 Hill, 219.

132. Where a former recovery, relied upon as a defence by plea in bar, was in reference to the same subject-matter now involved, was between the same parties, and the facts relied upon now were distinctly put in issue, and were found by the triers, and this appears by the record, and no objection is taken to the form of pleading the estoppel, the estoppel is conclusive, notwithstanding there may be some formal differences between the present and former action. *Gray v. Pingry*, 17 Vt. 419.

133. The plaintiffs had sold goods to the defendants, who sent them a check for the balance, with an account stated. One of the plaintiffs objected that the balance was too small, but received the check; and having said nothing to the defendants for several months, sued them for an alleged deficiency. Held, that the plaintiffs were concluded as to the amount of the balance, by receiving the money as payment of it. *Davenport et al. v. Wheeler et al.*, 7 Cowen, 231.

134. In an action for the recovery of land, if the plaintiff proves no title, the defendants being in possession, cannot be ousted; but if the defendants have entered into possession, claiming under the plaintiff, and in subordination to his title, they are estopped from questioning it. *Hoen v. Simmons*, 1 Cal. 119.

135. The principle of the doctrine of estoppel is, that where a man has entered into a solemn engagement, by and under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. *Bowman v. Taylor*, 2 Add. Eccl. 278.

136. A tenant, sued for use and occupation of premises by

the landlord of whom he took them on lease, is at liberty to show that the latter's title expired during the tenancy, though the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction from the real owner; and if the tenant sets up such a defence when so sued in a county court, that court has no longer any jurisdiction to decide the cause, as title to land has come in question. *Mountney v. Collier*, 16 Eng. Law and Eq. Rep. 232.

137. A verbal admission by a party that personal property in his possession belonged to the plaintiff, does not estop the defendant from showing that the admission was made by mistake, or that it is untrue, especially where the plaintiff was not misled by it, or it did not induce him to institute his action. *Gamble v. Gamble*, 11 Ala. 966.

138. The General Conference of the Methodist Episcopal Church, having the right to change its organization and divide the church, have also the right to concede to the local churches the right to decide by majorities to which division the local societies should be attached. And where a local church, by a majority, determined to adhere to the southern division, it is bound to adhere to that division, and a minority of that local society, having put the question upon that test, are estopped to controvert the authority of the majority to decide the question, and to claim the use of the church building, in opposition to the rights of the majority, for any portion of time. *Wilson v. John's Island Church*, 2 Rich. Eq. 192.

139. Where a mortgagee consents to the sale of the property mortgaged, or permits it to be levied upon without asserting his claim thereto, he is barred from claiming title to it, as against the purchaser thereof. *Grace v. Mercer*, 10 B. Mon. 157.

140. Although, where a mortgagee directed and sanctioned a sale of the mortgaged property, where the property was sold without any reference to the mortgage or the equity of redemption, and received the proceeds, and did not object to or quash the sale, his conduct implied an admission of title in the mortgagor, and an abandonment of any title in himself inconsistent thereto, and barred him from setting up the

mortgage in a court of equity against the purchaser, yet it is not so where the lien is acquired by attachment in chancery. *Brace v. Barclay*, 10 B. Mon. 261.

141. Where a party gave his receipt to an alleged corporation by its supposed corporate name, it was held not to be such an admission as should estop him from denying the corporate character, and putting the company to strict proof of their charter. *The Welland Canal Co. v. Hathaway*, 8 Wend. 480.

142. An entry by a *teller* or clerk of a bank, of the amount of a deposit in the bank-book of a dealer with the bank, being the act only of the agent of the bank, and not of both parties, is not conclusive. If, therefore, the dealer can afterwards prove that there was a mistake in the entry, he may recover, in an action for money had and received, the sum not credited, even though the bank have a by-law that all payments made and received must be examined at the time; for corporate by-laws shall not affect strangers. *Mechanics' and Farmers' Bank v. Smith*, 19 Johns. 115.

143. If a man stands by and suffers his name to be put down at an auction as the purchaser, by direction of the bidder, he is estopped to deny that he is the bidder. *Jenkins v. Hogg*, 2 Con. Ct. 821.

144. If it is a case of innocent mistake, still, if it has been acted on by another, it is conclusive in his favor, as, where the supposed maker of a forged note innocently paid it to a *bona fide* holder, he shall be estopped to recover back the money. *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

145. If a minor, having such discretion and intelligence as to be able to comprehend the nature and effect of his conduct in reference to his legal rights, stands by where a slave, which he knows he owns, is offered for sale by one having no title, and make no objection, he cannot, upon arriving at majority, dispute the title of the purchaser, either in a court of law or equity, for the case is one of positive fraud, which infancy will not excuse. *Barham v. Turbeville*, 1 Swan; (Tenn.) 437.

146. A judgment confessed by a husband, in order to defraud his wife, is still valid between the parties, and after

the death of the husband, on *sci. fa.* against the wife, as his administratrix, to revive such judgment, she cannot question the validity of it; she is, therefore, not estopped by judgment on the *sci. fa.* against her, to set up the fraud in an action against her to recover the land. *Mitchell v. Kintzer*, 5 Barr, 216.

147. Where a man lives with a woman, and holds her out as his wife, he is estopped from denying it, when charged with liabilities as her husband; but such recognition cannot affect the rights of property even as between themselves. *Ponder v. Graham*, 4 Florida, 23.

148. So, the executor of such a person is not estopped from asserting the illegality of the marriage, when it was absolutely void. *Ib.*

149. In an action by D. against A., B. and C., as endorsers upon certain notes, given as security for money loaned by D. to them, with the understanding that they were all interested in the transaction for which the money was needed, while, in fact, C. was the only agent of A. and B. in the business, it was held, that B. having united in the representations, upon the faith of which D. advanced the money, was estopped from denying C.'s interest in the transaction. *East Haddam Bank v. Shailor*, 20 Conn. 18.

150. In trover for goods which the defendant procured of the plaintiff by a fraudulent purchase, it appeared that the plaintiff sold the goods, claiming them as the next of kin to a decedent; but no administration having been taken out, he then had no title; and the defendant, after sale, took letters of administration himself, and caused the sale to be proved and registered, so that he thus had the legal title, which he set up against the plaintiff; but held, that he was estopped to deny the legal title of the plaintiff, for his purchase of the goods and registry of sale admitted the plaintiff's legal right, and charged himself with the necessary assent as administrator, which should operate by relation to vest the legal title in the plaintiff from the beginning. *Cross' Administrators v. Terlington*, 2 Murph. 6.

151. Where the assignee of a chose in action purchases it after a promise to him by the debtor to pay, or his acknowledgment to him, or in his hearing, of the debt, made before or

at the time of the assignment, or where the debtor stands by and silently sees the debt assigned, he shall be estopped to set up any defence as against the assignee. Thus, the debtor shall not be permitted to show that it was before paid. *Buchanan v. Taylor*, Addis. 155.

152. The defendant having given a bond and warrant of attorney to secure a gaming debt, the bond was offered for sale to S., whose attorney applied to the defendant, who said the debt was good, and would be paid when due; S. thereupon paid and took an assignment. After this the defendant moved to set aside the judgment, but was held concluded by his representation, on which S. had acted. *Davison v. Franklin*, 1 Barn. & Adol. 142.

153. When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor, and he cannot set up the want of notice to protect himself. *Brewer v. Brewer*, 19 Ala. 481.

154. When the complainant's conduct has not been the basis of the acts of the person through whom the defendant claims, and his silence has not misled any one, he will not be held to have forfeited his equitable rights by the mere failure or omission to assert them. *Id.*

155. The acts of an administrator may be set up against him as an estoppel *in pais*. *Thomas v. Brooks*, 6 Texas, 369.

156. Where a suit is instituted by one having the beneficial interest in a note, in the name of the payee, who is dead, for the use of the former, and the defendant appears, and suffers a judgment *nil dicit* to be rendered against him, he is estopped from afterwards moving to vacate the judgment on account of the death of the nominal plaintiff; and a security of the defendant in such a case is as much concluded by the judgment as the defendant himself. *Powell v. Washington*, 15 Ala. 803.

157. If A., having the title to slaves, recognises the right of B. to dispose of them by will, and, upon a demand by the personal representative of B., surrenders them to him, and,

with actual notice of all the proceedings, stands by and suffers them, without objection on his part, to be divided, under an order of the orphan's court of Alabama, among the distributees of the estate, and to be carried by them into other states, he is estopped from setting up against such personal representative any claim for or on account of said slaves. *Harrison v. Pool*, 16 Ala. 167.

158. It is a well-established general rule, that where a purchaser has been put in possession, he cannot afterwards acquire a title, and set it up in opposition to the vendor; if he extinguishes an incumbrance, or buys in an outstanding title, all he can ask is the repayment of the money so paid out. *Hardeman v. Cowan*, 10 S. & M. 486.

159. And the rule applies where the purchase of the incumbrance is by the wife of the vendee. *Ib.*

160. So, if a stranger furnish money to the wife, to purchase the outstanding title, taking the deed to himself to secure the repayment of the money so advanced, and authorizing the wife to dispose of the land for her own benefit, she paying to him the amount of his advancement. *Ib.*

161. There can be no estoppel where there is no privity of estate. *Langston v. M'Kinnie*, 2 Murph. 67.

162. The maxim *qui tacet consentire videtur*, &c., is not an estoppel in law. *Dennis v. Warder*, 3 B. Mon. 173.

163. It seems, that if a minor, knowing of his title to property, permits another to purchase it without giving notice of his claim, he cannot afterwards set up his claim against the purchaser. *Hall v. Simmons*, 2 Rich. (Eq.) 120.

164. An estoppel must be certain to every intent, and precise and clear. *Lajoie v. Priman*, 3 Mis. 529.

165. One who is not bound by, cannot take advantage of, an estoppel. *Lansing v. Montgomery*, 2 Johns. 382.

166. It must be reciprocal and certain to every intent. *Bolling v. Mayor*, 3 Rand. 563.

167. Every man is bound to speak, and according to the truth of the case, and the law will presume he has done so, and will not allow him to contradict such a reasonable presumption. This is the reason and foundation of estoppels. The estoppel prevents circuitry of action; the truth is deemed

to be shown by what estops. But the estoppel must be certain to every intent, for no one shall be denied setting up the truth, unless it be a case of plain contradiction to his former allegations and acts. *Pelletreau v. Jackson*, 11 Wend. 117.

168. When, in an action of trespass *quare clausum*, &c., the plaintiff claimed title under certain proceedings under a lottery act of 1786, and the defendant contended that such proceedings were defective, and conferred no title, it was held, that he was not estopped from setting up such defence, by the fact that he himself claimed title to a part of the premises under a different grantor, and under a deed reciting that the lot was drawn in the lottery. *Hovey v. Woodward*, 33 Maine, (3 Red.) 470.

169. A receiptor of property to the sheriff, who has taken it in execution, is estopped to question the sheriff's title, though he have suffered it to remain with another by whom it is eloiigned; otherwise, if he be ousted by title paramount or by force. *Phillips v. Hail*, 8 Wend. 610.

170. The statement of value by the receiptor in the receipt thus given is conclusive. *Drown v. Smith*, 3 N. H. 299.

171. The plaintiff, in possession of land, was hired by the defendant to depasture his cattle on the land. In assumpsit for the price, the defendant was holden concluded, and could not, with a view to invalidate the contract, show the land to be his own and not the plaintiff's. *Eastman v. Tuttle*, 1 Cowen, 248.

172. If a person, with full knowledge, permits another, without objection, to sell his property as the property of the vendor, he will not be permitted to question the title of a *bona fide* purchaser. So, where one has a secret title to, or trust or interest in property, and permits another to expend money on the credit of such property. *Watkins v. Peck*, 13 N. H. 360.

173. Where a person, claiming to be a *bona fide* purchaser of real estate, has made a verbal contract for the sale of it, and the proposed purchaser has gone into possession, a judgment on a mortgage of earlier date against the tenant will not estop the seller from showing such mortgage to be fraud-

ulent, unless he had notice of the suit. *Warren v. Cochran*, 7 Foster, (N. H.) 339.

174. A town in Maine notified another town that James Curtis, his wife and their seven children, naming them all, had fallen into distress and had been supplied as paupers. The second town replied, acknowledging receipt of the notice "touching the Curtis family," and denying that James Curtis had a settlement in their town. Held, that they were not estopped to deny the settlement of the wife and children in their town. *Palmyra v. Prospect*, 30 Maine, (17 Shep.) 211.

175. Where land has been dedicated to public use, and enjoyed as such, and private rights have been acquired with reference to it, the original owner is precluded from revoking it. *Cincinnati v. White*, 6 Peters, 439.

176. Where a surviving partner, on settlement with the administrator of the deceased partner, accounts for a certain sum as being due from a debtor to the firm, the settlement might, if unexplained, operate as an admission that such amount *only* was due from the debtor; but it would not estop the surviving partner, in a suit against the debtor, from recovering a larger amount. There can be no estoppel where there is no privity. *Rephard v. Pearson*, 21 Ala. 473.

177. The rights of a party under a contract are not impaired by his expressing the opinion that he has no such rights, provided others have not acted upon the faith of such expression. *Hildreth v. Pinkerton Academy*, 9 Foster, (N. H.) 227.

178. Where one, by his words or conduct, *willfully* causes another to believe in a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. By the term *willfully*, it must be understood, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; yet generally, without regard to intention, if the party so conducts himself as to deceive a *reasonable* man to his prejudice, he will be estopped

from asserting the truth. *Freeman v. Cooke*, 2 Welsb. (H. & G.) 653; *Derr v. Baldwin*, 1 Zabriskie, 551.

179. The doctrine of estoppel does not apply to the sovereign or his assignees. *Wallace v. Maxwell*, 10 Ired. 110.

180. A party, having waived a constitutional provision, cannot subsequently ask for its protection. *Lee v. Tillotson*, 24 Wend. 337.

181. A person sued by a corporation on a contract made with the plaintiffs as a corporation, is not estopped from denying that the corporation existed at the time the suit was commenced. *Guaga Iron Co. v. Dawson*, 4 Blackf. 202.

182. *Quere*, whether to deny the existence of the corporation at the time of the contract. *Ib.*

183. Where a person has notice that land owned by him is about to be sold on execution against another, he is bound to give notice of his claim; and mere possession of the premises by him is not sufficient notice. *Keeler v. Vantwyle*, 6 Barr, 250.

184. So, if one permits another to purchase land to which he sets up a title, he will be estopped to assert such title afterwards against the purchaser. *Brothers v. Porter*, 6 B. Mon. 106.

185. Where a party, having title to land, neither suppresses no fact connected with his title, but under a misapprehension of his legal rights, supposes that another has a prior lien to his own, and expresses such opinion, he is not estopped from setting up his title against a purchaser, under the supposed prior lien, having a full knowledge of all the facts. *Pettit et al. v. Johnson et al.*, 15 Barb. 55.

186. A wharfinger having acknowledged certain timber on his wharf to be the plaintiff's, knowing of an adverse claim of A. in trover for the timber, was held estopped to question the plaintiff's claim by setting up A.'s title. *Gosling v. Birnie*, 7 Bing. 339.

187. A constable coming to levy on one Benedict's property, Stephens pointed out lumber, one-fifth of which he said belonged to Benedict, whereupon the constable levied on and sold it. Held, that Stephens, who originally claimed

four-fifths, was concluded, and could not set up a right to the whole ; and that B. and the purchaser of the one-fifth at the constable's sale, might recover for the one-fifth of Stephens, who had connected the whole, although, in truth, Stephens had title to the whole. *Stephens v. Baird*, 9 Cowen, 274.

188. On levying an attachment, (mesne process,) the defendant told the officer that the goods belonged to a third person ; on trial he succeeded in the attachment suit, and then the officer sold the goods without authority. Held, that the defendant in the attachment suit was not precluded from recovering against the officer for the tortious sale. *Wallis v. Truesdell*, 6 Pick. 455.

189. One who owned a slave stood by and allowed him to work for another, who believed he had a right, and to whom the former knew the slave had been bequeathed by A. as his slave, the owner not giving notice of his claim, was held to be concluded against an action by the owner for the slave's services. *Demper v. Louzer*, 6 Wend. 436-7.

190. Where the sheriff, having a *fi. fa.* against Dukes, one Ufford, who owned a negro, told the sheriff he belonged to Dukes, whereupon the sheriff levied upon the negro and sold him ; but before the sale, Ufford explained to the sheriff that Dukes had no other title to sell the negro, and pay himself a debt due to him from Ufford. Held, that the latter was not concluded. *Ufford v. Lucas*, 2 Hawks, 214.

CRIMINAL EVIDENCE.

Abortion.

1. The nature of the poison or other noxious thing must be proved. Upon an indictment on the 43 Geo. III. c. 58, s. 2, for administering *savin* to a woman not quick with child, with intent, &c., the charge was, that the prisoner administered "six ounces of the *decoction* of a certain shrub called *savin*, then and there, being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called an *infusion*, and not a decoction. It was objected that the medicine was misdescribed, but LAWRENCE, J., overruled the objection. He said, *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered *any matter or thing* to the woman with intent to produce abortion. *Phillip's Case*, 3 Camp. 78.

2. The counsel for the prisoner, cross-examining as to the innocuous nature of the article administered, VAUGHAN, B., said, "Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely, with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of parliament." *Coe's Case*, 6 C. & P. 403.

Adultery.

1. Where, on the trial of an indictment for adultery, a witness for the prosecution testified to acts of familiarity between the defendant and his alleged paramour, occurring about the time of the offence as charged, and, on cross-examination, the witness left it doubtful whether the acts testified

to might not have occurred a year previous, it was held, that the doubt thus raised as to the time did not render the evidence incompetent, however its effect might be thereby diminished. *Commonwealth v. Morris*, 1 Cush. 391.

2. A paper, purporting to be a certificate of marriage solemnized in another state, by a clergyman resident there, but not authenticated in any manner, is not admissible under the provisions of the statutes of 1840, c. 84, and 1841, c. 20, on the trial of an indictment for adultery, to prove the fact of marriage, "as circumstantial or presumptive evidence, from which the fact may be inferred," though such paper be derived from the possession of the wife of the defendant. *Id.*

3. On an indictment of a married man for adultery, the suspicions and jealousy of his wife are not evidence against him. *State v. Crowley*, 13 Ala. 172.

4. Neither the fact of living in adultery, nor its openness or notoriety, can be proven by the rumor and talk of the neighborhood. *Belcher v. State*, 8 Humph. 63.

5. The wife of A. went to live in the family of B., upon which A. said to B. that she had ruined him and would ruin B.; B. replied that she must live somewhere, and he would not turn her away. Held, that this had no tendency to prove illicit intercourse between B. and A.'s wife. *State v. Crowley*, 13 Ala. 172.

6. On an indictment for adultery, evidence tending to show a commission of the offence eighteen months after the finding of the indictment, and unconnected with other acts before the finding of the indictment, is inadmissible. *Id.*

7. The party with whom the prisoner is alleged to have committed the offence is a competent witness for the prisoner. *Id.*

8. On an indictment for adultery containing two counts, in one of which the offence was charged to have been committed with E. B., spinster, and in the other with a woman whose name was not known, evidence being introduced tending to show that the person of the woman was known, and that her name was E. B., it was held, that if the jury doubted, upon the evidence, whether the true name of the woman was E. B., they might find the defendant guilty on the second count. *Commonwealth v. Thompson*, 2 Cush. 551.

9. In Massachusetts, an allegation, in an indictment against a man for adultery, that the woman, with whom the offence was committed, is the lawful wife of another man, is a sufficient allegation that she is not the lawful wife of the defendant. *Commonwealth v. Reardon*, 6 Cush. 78.

10. In an indictment against a man for adultery with the lawful wife of another, it is not necessary, since the Revised Statutes, to allege either that the defendant was married or unmarried. *Ib.*

11. In New-Hampshire, on an indictment for adultery, a copy of the record of the marriage, from the town clerk's office, duly certified, with proof of the identity of the party, was held competent evidence. *The State v. Wallace*, 9 N. H. 515.

12. Evidence of improper familiarity between the parties accused, a short time previous to the act charged, is admissible in corroboration of other evidence. *Ib.*

13. If one of the persons charged with the offence of adultery is known by the name charged in the indictment, the other is not entitled to acquittal by showing that is not the true name. *The State v. Glaze*, 9 Ala. 283.

14. It being proved that one charged with living in adultery, four or five years before was living with a man whom she admitted to be her husband, who since that time has removed, and has not since been heard of, it was held, that the *onus* of proving he was dead rested upon her. *Ib.*

15. Upon a trial upon an indictment for adultery, the witness must depose to facts, and cannot give an opinion as to the guilt of the parties charged. *Ib.*

16. In an indictment for fornication and adultery, one who had been the husband of the *feme* defendant, but had been divorced from her on account of her adultery, is incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted. And if the testimony be received at the trial, after objection made to it, and the defendants be found guilty, and the man alone appeals, it is not thereby rendered competent against him. *The State v. Jolly*, 3 Dev. & Bat. 110.

17. A married man, who visits and remains with his paramour one night in every week for seven months, at her resi-

dence, a half mile from his own house, is guilty of the offence of living in adultery, within the meaning of the statute of Alabama. *Collins v. The State*, 14 Ala. 608.

18. On the trial of an indictment for being found in bed with another man's wife, a marriage in fact must be proved. *The State v. Rood*, 12 Vt. 396.

19. Adultery is illicit intercourse between two persons, one of whom, at least, is married, and this is implied by the term. Therefore, in an indictment for adultery, the marriage of either party need not be alleged. *The State v. Hinton*, 6 Ala. 864.

20. Upon an indictment for living in adultery, the confessions of the party, of a previous marriage, are admissible to prove the fact of the marriage. *Cameron v. The State*, 14 Ala. 546.

21. A conviction of bigamy in another state is not evidence on which to found a charge of adultery in Ohio. *Wilson v. Wilson*, Wright, 128.

22. A man will not be supposed to have committed adultery while his wife and child are on the same bed with him. *Scott v. Scott*, Wright, 469.

23. In an indictment for incestuous adultery, it is unnecessary to charge a common knowledge of the relationship, if the charge of knowing of the relationship is made against the party indicted. *Morgan v. The State*, 11 Ala. 289.

24. In an indictment charging a father with living in adultery with his daughter, his confessions that she is so are admissible in evidence. *Id.*

25. Upon the trial of an indictment for adultery in one county, with a woman named, evidence is not admissible that the defendant, after the time alleged in the indictment, cohabited with the same woman, then big with child, in another county, and called her his wife, and said that he had lived at the place named in the indictment. *Commonwealth v. Horton*, 2 Gray, 354.

Affray.

1. To support a prosecution for an affray, the prosecutor must prove, 1st. The affray, or fighting, &c.; 2d. That it was in a public place; 3d. That it was to the terror of the king's subjects; 4th. That two or more persons were engaged in it.

2. Words alone will not constitute an affray, but accompanied by acts, such as drawing knives and attempting to use them, in a public street of a city, will. *Hawkins v. The State*, 13 Geo. 322.

3. A field surrounded by a forest, and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly, guilty of an affray. *Taylor v. The State*, 22 Ala. 15.

4. Two being indicted for an affray, testimony "that, several months before the occurrence, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the one making the threat, without some proof connecting this encounter with the affray. *Skains v. The State*, 21 Ala. 218.

Arson.

1. "There is, perhaps, no crime in which evidence is so difficult as in arson, both on account of the secrecy and privacy with which it is usually committed, and the devouring nature of the element raised, which destroys all the usual traces and *indicia* by which, in other instances, guilt is detected; nevertheless, it is not to be imagined that, on account of this difficulty, the prosecutor is to be considered as relieved from any part of the obligation to make out his case; but only that, in default of direct testimony, which is very seldom to be obtained, a conviction may be legally and safely obtained on circumstantial evidence, if it be only sufficiently weighty. To require direct evidence of the willful completion of the crime would be in most, and generally the worst cases, to secure absolute impunity to the criminal law."

“Unlike other crimes, the proof of the *corpus delicti* in willful fire-raising is generally mixed up with that which goes to fix the guilt upon the prisoner; nor indeed, in cases where direct evidence cannot be obtained, can it well be otherwise, as the first effect of the flames is to consume the combustibles which raised them. The *indicia*, which go to substantiate at once the *corpus delicti* and the guilt of the prisoner, are chiefly that the fire broke out suddenly in an uninhabited house, or in different parts of the same building; that combustibles have been found strewed about or dropped at intervals, or placed in convenient situations to excite combustion, as under beds, under thatch, under a stack, &c.; that the prisoner had a cause of ill will at the sufferer, or had been heard to threaten him, or had been seen purchasing combustibles, or carrying them in the direction of the premises, or lounging about them at suspicious hours. To this is to be added where the fire was raised to defraud insurers, the important fact of the premises or its furniture having been insured at a higher value, or in different offices at the same time, and of a claim having been made or attempted to be made at both offices.” Alison’s Principles of the Criminal Law of Scotland, 444.

2. A barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication by a pair of bars, is within the curtilage of the house. *The People v. Taylor*, 2 Mich. (Gibbs,) 250.

3. Where an indictment for arson, under statute of Massachusetts of 1804, c. 131, charged that the defendant set fire to the building of A., whereby a dwelling-house was burned, the allegation of the ownership of such building, being descriptive, is material, and if it is not proved as set out, the defendant is entitled to a verdict. *The Commonwealth v. Wade*, 17 Pick. 395.

4. To constitute arson at common law, it must be proved that there was *an actual* burning of the house, or of some part of it, though it is not necessary that any part of it should be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself. *Comm. v. Van Shaack*, 16 Mass. 105.

5. The least burning of the house is sufficient to constitute the crime. The charring of the floor to the depth of half an inch is certainly sufficient. *The State v. Sandy*, 3 Ired. 570.

6. In order to constitute the felonious offence of arson at common law, the fire must burn *the house of another*. The burning of a man's own house is no felony at common law, but such burning in a town, or so near to other houses as to create danger to them, is at common law a great misdemeanor. 1 Hale C. P. 568.

7. Where the prisoner was charged with burning a dwelling-house, and it appeared that the building burned was designed and built for a dwelling-house, was constructed like one, was not painted, though designed to be, and some of the glass in an outer door had not been put in; it was held, that this was not a dwelling-house in such a sense that the burning of it would constitute the crime of arson. But the law is otherwise with regard to a dwelling-house, once inhabited as such, and from which the occupant is but temporarily absent. *The State v. McGowan*, 20 Conn. 245.

8. It must be proved that the act of burning was both willful and malicious, otherwise it is only a trespass, and not felony. 1 Hale C. P. 569.

9. A stable, which adjoined a dwelling-house, was set on fire; the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. ALDERSON, B., in summing up the case to the jury, directed them to say by their verdict (should they find the prisoner guilty) whether the house took fire before the family was in the yard or after. If they were of opinion that it was after the family was in the yard, his lordship said that he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. But his lordship added, that the point being a new one, and of very great importance, he should not take upon himself to decide it there, but should reserve the point for the decision

of the judges. The prisoner was acquitted of the entire charge. *Warren's Case*, 1 Cox C. C. 68.

10. On a charge of arson, it appeared that a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed. CRESSWELL, J., said, "I have conferred with my brother PATTESON, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all. The prisoner must be acquitted." *Maria Russell's Case*, Carr. & M. 541.

11. The prisoner was convicted before Mr. Justice PATTESON, at the Bedfordshire spring assizes, 1844, for feloniously setting fire to an outhouse of Thomas Bourn. The building set fire to was a pig-sty, that shut at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: First, the prosecutor's house fronting the public road, with a back door opening in the yard; then a pale fence about two feet, then a cottage, then a barn attached to it; the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of them had any door or opening into the yard. Next to the cottage and barn was a stable; then a barn; then a pig-sty, all in the possession of the prosecutor, and opening into the yard. Next to the pig-sty was a paled fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields. On the part of the prisoner it was contended that the pig-sty was not an outhouse, within the statute 7 Wm. IV. and 1 Vict. c. 89, s. 3. The learned judge reserved the point for the opinion of the judges; and the case was considered at a meeting of all the judges, except COLERIDGE, J., and MAULE, J., in Easter term, 1844, when their lordships were

unanimously of opinion that the conviction was right. *Amos Jones' Case*, 2 Moody, (C. C.) 308.

12. If it be, in fact, a dwelling-house, the court will not inquire into the tenure or interest of the occupant. *People v. Van Blaricum*, 2 Johns. 105.

13. A person is presumed to intend the ordinary consequences of his acts; and it devolves upon a person charged with crime to rebut this presumption by evidence of different intent. 2 R. S. 657, § 4; *People v. Orcott*, Parker's Criminal Reports, 202.

14. On the trial of an indictment for the malicious burning of a building, a board from the building in question being produced in evidence, and exhibited to the jury as the only part of the building burnt, it was held, that whether the same had been so affected by fire as to constitute a burning within the legal meaning of the term, was a question of fact to be determined by the jury, upon the evidence before them, as in ordinary cases. *Commonwealth v. Betton*, 5 Cush. 427.

15. To constitute a setting on fire, it is not necessary that any flame should be visible. *Stallion's Case*, 1 Moody, (C. C.) 398.

16. Where the prisoner was indicted under 7 Wm. IV. and 1 Vict. c. 89, s. 3, and it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way, that it had been at a red heat, though not in a blaze, PARKE, B., held that the offence was complete. *Parker's Case*, 9 C. & P. 45.

17. With regard to the question, how far it is necessary to prove that the prisoner himself set fire to the property with his own hand, TINDAL, C. J., in his charge to the grand jury, at Bristol, made the following remarks: "You will inquire, first, whether the prisoner set fire to the premises himself—in such case no doubt of his guilt can exist—and if the proof falls short of this, you will then consider whether he was jointly engaged in the prosecution of the same object with those who committed the offence. If by his words and gestures he incited others to commit the felony, or if he was so near the spot at the time that he, by his presence, willfully

aided and assisted them in the perpetration of the crime, in either of these cases the felony is complete, without any actual mutual share in the commission." 5 C. & P. 266.

18. If the indictment alleges that the offence was committed in the night time, and it appears to have been committed in the day time, it is no variance. *Minton's Case*, 2 East P. C. 1,021.

19. An indictment for burning a stable is not supported by proof of burning a shed, which has been built for and used as a stable originally, but had latterly been used merely as a lumber shed. *Colley's Case*, 2 Moo. & R. 475.

20. But *semble*, a building built originally for a stable does not cease to be a stable, though horses have not been kept in it for three years, if nothing has been done in the mean time to show an intention of never employing it for that purpose again. *Reg. v. Hammond*, 1 Cox C. C. 60; S. C. 1 C. & K. 303.

Assault and Battery.

1. In an indictment against one for impeding an officer in the execution of his official duty, the allegations must show the nature of the official duty, the manner of its execution and the mode of resistance. *The State v. Burt*, 25 Vt. (2 Deane,) 373.

2. On an indictment for an assault and battery, the defendant may give evidence to show that he owned the premises on which the assault and battery were committed, and that he did the acts complained of in defence of the possession of his said premises; and if the assault and battery were committed in resisting persons entering upon the premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard, of four years' growth, without his consent. *Harrington v. The People* 6 Barb. Sup. Ct. 607.

3. Where, in an action of assault and battery, the defendant undertook to show that he had committed the assault without malice, it was held competent for the plaintiff to

show that the defendant had offered to fight him since the commencement of the action. *Mills v. Carpenter*, 10 Ired. 298.

4. To constitute the crime of malicious stabbing, such malice as is necessary to make killing murder in the first degree is not necessary; malice, according to its common law signification, is sufficient. *Wright v. The State*, 9 Yerg. 342.

5. Where the stabbing is proved, the law presumes the existence of malice; to rebut which, the proof must be of such a nature as to show that the stabbing was done under such circumstances as would, had death ensued therefrom, have mitigated the offence from murder to manslaughter, or excusable homicide, or to leave it doubtful whether it were not so done. *Ib.*

6. Evidence that the prosecutor, a mulatto, was a turbulent, insolent, saucy fellow, is inadmissible. So, also, is evidence that he said, some time after the stabbing, he had struck the defendant before he stabbed him. *Ib.*

7. An indictment for an assault with an intent to commit manslaughter is not supported by the testimony of a single witness, that the prisoner was seen with a knife in his hand in pursuit of the slave, when he was stopped by the witness, and then made threats against the life of the slave. *Bradley v. State*, 10 S. & M. 618.

8. On the trial for an assault with intent to commit a rape, the prosecutrix deposed that "she awoke in the night, and on extending her hand, felt some person over her in the act of committing a rape," and that when she touched him, he sprang from the bed, &c. Held, that this testimony did not establish the *corpus delicti*; that the witness swore to a conclusion, whereas she should have stated the facts and circumstances, leaving the conclusion to the jury. *Sullivan v. State*, 3 Eng. 400.

9. Where the evidence disclosed that the defendant presented a gun within shooting distance of and against the prosecutor, who was then armed with a knife, and about to attack the defendant, this is no assault, if there was no attempt to use the gun, or intention to use it, unless first assailed with the knife. *State v. Blackwell*, 9 Ala. 79.

10. Evidence that the defendant had beaten *Catharine Swails*, will not support an indictment for an assault and battery on *Ratharine Swails*. *Swails v. State*, 7 Blackf. 324.

11. If, on the trial of a charge of assault and battery, which has in fact been committed, a witness falsely testifies to such facts as aggravate the battery, such false testimony is material, and is perjury. And, in such case, if the oath be administered to a witness, pending a trial, by one who is acting as an assistant of the clerk, at his request, it is presumed to have been done with the assent of the presiding judge, and therefore properly administered. *Stephens v. The State*, 1 Swan, (Tenn.) 157.

12. Where one is indicted for an assault, with intent to commit murder in the first degree, by the Tennessee act of 1832, c. 22, this includes an indictment for an assault and battery; and, upon failure of proof to warrant a conviction of felony, the defendant may be convicted of a misdemeanor. *State v. Bowling*, 10 Humph. 52.

13. Where one presents a pistol at another and threatens to shoot, and finally lowers the pistol, and it is not loaded, the man is guilty of an assault, and he is bound to show that the pistol was not loaded; but whether that fact would excuse him or not, without also proving that the other person knew it was not loaded, *quere?* *State v. Cherry*, 11 Ired. 475.

14. Evidence of the good character of the defendant is not admissible in a prosecution for an assault. *Drake v. The Commonwealth*, 10 B. Mon. 225.

15. An indictment for an assault with a "basket knife," with intent to kill, is supported by evidence of an assault with "basket iron." *The State v. Dame*, 11 N. H. 271.

16. Upon the trial of an action for an assault and battery, where the defendant relies upon a prior assault by the plaintiff as a justification, the defendant will not be allowed to give in evidence the record of a conviction of the plaintiff criminally, for such prior assault. *Robinson v. Wilson*, 22 Vt. (7 Washb.) 35.

17. Proof that the prosecutor struck the first blow will not justify an enormous battery. *The State v. Quin*, 3 Brev. 515.

18. A. was indicted for an assault upon B. with intent to kill. He had previously written a very obscene letter concerning his own wife, B.'s mother-in-law, which provoked B. to make the first assault. Held, 1. That this letter was inadmissible as evidence against A.; 2. That in such case, a charge to the jury, that they must find A. guilty if they believed he assaulted B. with intent to take his life, is erroneous, because it takes from the jury all considerations of provocation or self-defence. *The State v. Williamson*, 16 Mis. (1 Bennett,) 394.

19. Where two assaults are alleged in an indictment, the solicitor is not required to elect upon which he will rest the case for the state, until after the evidence has been heard. *The State v. Sims*, 3 Strobb. 137.

20. To ride a horse so near to one as to endanger his person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault. *Ib.*

21. On the trial of an indictment, containing a single count for one offence of assault and battery and resisting an officer in the execution of process, the prosecution, after proving an assault and one act of resistance, cannot give evidence of a similar offence, committed at another time. *The People v. Hopson*, 1 Denio, 574.

22. On the trial of an indictment for resisting a constable, while engaged in executing process against the defendant's property, the defendant is not entitled to show that the officer had not taken the oath of office, or given the security required by law, it being sufficient, in such a case, that the party resisted was an officer *de facto*. *Ib.*

23. Matter of provocation cannot be shown in justification of an assault and battery, unless so immediately preceding the assault as to create a fair presumption that the violence was committed under the sudden influence of passion excited by it. *Coxe v. Whitney*, 9 Mis. 531.

24. In an indictment for an assault with an axe, it will be inferred that it was a deadly weapon, without such allegation. *Dollarhide v. United States*, 1 Morris, 233.

25. On a trial for an assault and battery, the state proved that the defendant had said, a short time before he com-

mitted the assault, that he expected to kill some one before he left town. Held, that the evidence was rightly admitted to show the intention of defendant. *Read v. The State*, 2 Carter, (Ind.) 438.

26. Where the defendant, on his trial for an assault with intent to murder, proposed to ask a witness "if he did not know that Dill (the party assaulted) had threatened to drive the defendant from the place or take his life, it was held to be competent evidence to be submitted to the jury, for their judgment, under the statute, either as a justification, or to rebut the presumption of malice. *Howell v. State*, 5 Geo. 48.

27. A person to be liable as a joint trespasser in an assault and battery, where he was not present at the commission of the offence, must be proven to have done something which led directly to the commission of the offence by his co-trespasser. *Bird v. Lynn*, 10 B. Mon. 422.

28. On the trial of an action of trespass, by a woman, for an assault upon her person, with intention to have illicit intercourse with her, the plaintiff introduced a witness, who testified, that at the time of the alleged trespass, he lived with the plaintiff, and one evening, between sundown and early candle-light, the plaintiff was sitting in her bedroom, tending her child; that the defendant came into the keeping-room adjoining the bedroom, and asked for a paper; that the plaintiff thereupon directed her daughter to go down into the basement story of the house, and get a light; that while she was gone for that purpose, the defendant went into the bedroom, and said something to the child; that soon afterwards, the plaintiff exclaimed, "Let go of me"—"keep your hands off me"—"keep your distance;" that while her daughter was coming in from the basement with a light, the defendant left the bedroom, and soon afterwards the house; that the position of the witness, during this transaction, was such that he could not see either the defendant or the plaintiff, but he knew the voices of both. The defendant objected to the testimony of this witness, but it was received. On a motion for a new trial, it was held, 1. That the matters of fact involved in this statement were proper evidence to go to the jury; 2. That as the objection was taken to the whole

testimony, the court did right in overruling it, even if the exclamation of the plaintiff was not admissible; but, 3. That it was admissible as an accusation of the trespass, which, though made to the defendant's face, he did not deny. *Stratton v. Nichols*, 20 Conn. 327.

29. To support an indictment for taking away property, it must be a violent taking from the actual possession of the owner at the time. *The State v. M'Dowell*, 1 Hawks, 449.

30. Where the indictment charged that the defendant assaulted "Silas Melville," with intent to kill, and the proof was that the name of the person assaulted was "Melvin," it was held, that this was such a variance that the court should have directed an acquittal. *The State v. Curran*, 18 Mis. (3 Bennett,) 320.

31. On the trial of an indictment for an assault and battery, where there was a question which party was the aggressor, it was held, that the fact that the defendant went to the place where the other party was, and called him out for the purpose of having a difficulty with him, did not, of itself, render him guilty of the assault and battery, unless he carried his intention into effect. *Yoes v. The State*, 4 Eng. 42.

32. On the trial of an indictment for assault and battery, in order to show some motive of resentment on the part of the defendant, it was held competent for the state to prove that the prosecutor had said, in the defendant's hearing, a short time before, "that no honest man would avail himself of the bankrupt act," and to prove further, that the defendant's father had previously been talking about taking the benefit of that act. *The State v. Griffis*, 3 Ired. 504.

33. Any obstruction of lawful process, whether it be by active means or the omission of a legal duty, is an indictable offence; but the indictment must show what the process was, that it was legal, and in the hands of a proper officer, and the mode of obstruction. *State v. Hailey*, 2 Strobb. 73.

34. On an indictment for an assault with an attempt to commit a rape, evidence of previous assaults on the prosecutrix are admissible, to show the intent with which the assault in question was committed. *Williams v. State*, 8 Humph. 585.

35. An indictment for an assault with intent to kill is not bad, because it alleges a battery (stabbing) in addition to the assault with intent to murder. *Cole v. The State*, 5 Eng. 318.

36. To support an indictment for an assault with an intent to murder, positive proof that the defendant actually intended to kill at the time of the assault need not be proved; but the jury may infer such intent, where the evidence shows that had death ensued the crime would have been murder. *Ib.*

37. A person who shoots at another with a gun, from a pre-conceived design to kill, and not under the influence of an apprehension that he may himself be shot, is punishable under the Tennessee act of 1829, c. 23, § 52. *Davidson v. The State*, 9 Humph. 455.

38. In an action for assault and battery, the defendant cannot give in evidence the bad character of the plaintiff, by way of excuse; especially where such character had no connection with the assault. *McKenzie v. Allen*, 3 Strobb. 546.

39. As to what is sufficient evidence to sustain an information against a justice of the peace, an informer and a constable, for assaulting and imprisoning a party, under color of a warrant of arrest for perjury, issued against him by the justice, on the oath of the informer, and executed by the constable. *Jones' Case*, 1 R. 748.

40. To constitute the offence of obstructing process, in a criminal point of view, there must be an active opposition, not merely taking charge of the debtor's property, keeping it out of view, and refusing, when called on by an officer, to place it within his reach. *Crumpton v. Newman*, 12 Ala. 199.

41. When a husband is indicted for an assault and battery on his wife, he may show, in mitigation of the fine, that, at the time of the assault, he was immediately provoked to its commission by her bad behavior and misconduct. *Robbins v. The State*, 20 Ala. 36.

42. A person indicted for an assault and battery pleaded a former conviction, and in addition to the record of the former case, offered to prove by a witness what was proven

by another witness at the former trial, who was still alive and within the state, in order to establish the identity of the causes of action. Held, that the testimony of the witness for that purpose was admissible, although the other witness was alive and within the state. *The State v. Smith*, 11 Ired. 33.

43. The unlawful taking and detaining of a person, without his consent, will support an indictment for assault and battery. *Long v. Rogers*, 17 Ala. 540.

Bigamy.

1. The prosecutor must prove the two marriages; that at the time of the second marriage the offender was legally married to another. The law will not presume a valid marriage in cases of bigamy as it will in civil cases. *Jacob's Case*, 1 Moody, (C. C.) 140.

2. Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson. PARKE, J., held the proof to be insufficient, and directed an acquittal. He subsequently expressed a decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman, *by the name of, and who called herself Hannah Wilkinson*," because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name, and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Drake's Case*, 1 Lew. C. C. 25.

3. If, in a case of bigamy, there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register which is produced to prove the first marriage, the prisoner must be

married, and having a husband alive, married with the widower of the deceased sister, she is guilty of bigamy, though by the 5 and 6 Wm. IV. c. 54, such marriage is declared to be null and void to all intents and purposes whatsoever. In deciding the point, Lord DENMAN, C. J., said, "I have no doubt whatever that this marriage was null and void under the act mentioned, but that circumstance does not, in my opinion, affect the charge against the female prisoner. Her offence consisted, not in the contracting that which, but for the existence of her husband, would have been a legal marriage, but in her going through the ceremony of marriage, and appearing to contract that which was a legal and binding union, at the time when she already had a husband living. That single fact constitutes the crime and the proof of it, and whether the union secondly contracted would or would not be null and void, if contracted under other circumstances, is a matter wholly immaterial to the inquiry. If it were otherwise in this case, the same argument would apply in all other cases; for if the second marriage be not null and void, the crime of bigamy cannot be committed. I am, therefore, decidedly of opinion that Jane Bawm committed bigamy by marrying with Thomas Webbe, though it was within the prohibited degree of affinity." *Reg v. Bawm*, 1 Cox C. C. 34.

4. If the first marriage be *void*, an indictment for bigamy cannot be sustained. Thus, if a woman marry A., and in the lifetime of A. marry B., and after the death of A., and whilst B. is alive, marry C., she cannot be indicted for bigamy in her marriage with C., because her marriage with B. was a mere nullity. 1 Hale P. C. 693.

5. The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid everywhere. *Phillips v. Gregg*, 10 Watts, 158.

6. On an indictment for bigamy, a former marriage may be proved by the declarations of the defendant, and by evidence of long cohabitation. *State v. Hilton*, 3 Rich. 434.

7. A nephew may lawfully marry his aunt, and if, whilst she is alive, he marries again, it is bigamy. *State v. Barefoot*, 2 Rich. 209.

8. On an indictment for bigamy, the defendant's admissions as to a former marriage, made while living with his first wife, may be given in evidence to prove the fact of such marriage. *Wolverton v. State*, 16 Ohio, 173.

9. After proof of the first marriage, the second wife is a competent witness, for then it appears that the second marriage was void. B. N. P. 287.

10. In a late trial for bigamy, the prisoner's declarations, deliberately made, of a prior marriage in a foreign country, were allowed as evidence of such marriage, without proving it to have been celebrated according to the law of the country. In that case, *WHITEMAN, J.*, (after consulting *CRESSWELL, J.*), in his summing up, told the jury that the question for them was, whether they were satisfied, by the statements made by the prisoner on the various occasions referred to, that he had been married to Mary Carlisle, in America, and that such marriage was a valid one according to the law of that country. The jury were to say, whether as against the prisoner it might not be taken, on the faith of his own repeated declarations, that the marriage had been a valid one according to the law in force at New-York. If the jury were satisfied that it was, they should return a verdict of guilty; and his lordship pointed out to them, that declarations hastily or lightly made were entitled to very little weight in such a case; but what the prisoner said deliberately, and where it was obviously his interest to deny his marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury. *Reg. v. Newton*, 2 Moo. & R. 503.

11. Where a marriage has taken place in England, it may be proved by a person who was present at the ceremony, and who can speak to the identity of the parties, and it is not necessary to give evidence either of the registration of the marriage, or of any license, or of any publication of banns. *Alison's Case*, Russ. & Ry. 109.

12. The marriages of Quakers must be proved to have taken place according to the customs of that sect. 1 Hagg. Appx. 9, 361.

13. An indictment for bigamy committed in one county,

found by a jury in another, where the party was apprehended, must state that fact. The prisoner was tried and convicted in Middlesex, in which county he was apprehended, of bigamy committed in Surrey. It being discovered, after the trial, that the indictment contained no averment as to the place or county where the prisoner was apprehended, the case was submitted to the judges, who determined that the judgment should be arrested. *Fraser's Case*, 1 Moody, (C. C.) 407.

14. Held, that evidence of conversations between the prisoner and his wife, and between the prisoner and his brother-in-law, tending to show an alienation of affection on his part in regard to his wife, was admissible on the question of motive. *The People v. Hendrickson*, Parker's Criminal Reports, 406.

15. Held, also, that the will of the prisoner's father-in-law was properly received in evidence, for the purpose of showing that the pecuniary expectations, which the prisoner might have entertained by reason of his alliance with the family, had been disappointed. *Ib.*

16. On the trial of an indictment for bigamy, the confessions of the defendant, though supported by proof of cohabitation and reputation, are not sufficient to establish the first marriage; proof of actual marriage, either by the record or by the evidence of an eye-witness, is requisite. *Gahagan v. The People*, Parker's Criminal Reports, 378.

17. The answer of a witness on cross-examination to an inquiry, the subject of which is purely collateral to the issue, is conclusive. *The People v. McGinnis*, Parker's Criminal Reports, 387.

18. On an indictment for bigamy, evidence that the defendant's marriage with the second wife had not been consummated by carnal knowledge of her body, is irrelevant. *The State v. Patterson*, 2 Ired. 346.

19. A copy of the record of the marriage, from the clerk's office, duly certified, with proof of the identity of the party, is proper evidence. *State v. Wallace*, 9 N. H. 514.

20. It is competent, on a trial for bigamy, to prove the first marriage, or either marriage, by procuring a copy of

the marriage license, with the certificate of the justice, endorsed on the license, that he had solemnized the marriage, and a certificate of the clerk of the county commissioners' court of the county, that the same was a true copy, transcribed from the original, on file in his office. *Jackson v. People, &c.*, 2 Scam. 232.

21. Where it was proved that parties appeared before a magistrate, or one acting as such, in New York, and declared their consent to a marriage, and this was followed by cohabitation and recognition of each other as man and wife, it was held to be sufficient proof, *prima facie*, of such marriage. *State v. Rood*, 12 Vt. 396.

22. The testimony of a witness, present at the time of marriage, is abundant evidence of the fact. *Warner v. Com.* 2 Virg. Cas. 95.

23. It is not necessary, it is said in several cases, to prove the ceremony to have taken place. It is sufficient to show that the defendant acknowledged the woman as his wife, and lived with her as such. *Ham's Case*, 2 Fairf. 391.

24. When the marriage was in a foreign country, such evidence has frequently been considered conclusive. *Cayford's Case*, 7; *Truman's Case*, 1 East P. C. 470.

25. On a trial for incest, alleged to have been committed by the prisoner with his legitimate daughter, that an actual marriage between the prisoner and his putative wife must be proved, and for this purpose neither cohabitation, reputation nor confession was adequate. *State v. Roswell*, 6 Conn. 446.

26. Marriage is a law complete, when parties, able to contract and willing to contract, have actually contracted to be man and wife in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. *State v. Patterson*, 2 Ired. 346.

27. When the first marriage is proved, the second wife is admissible as a witness, either for or against the prisoner. 1 Hale, 693.

28. An indictment on the North Carolina statute of 1790, averring that the first was alive at the second marriage, is

sufficient, without alleging that the first marriage then subsisted. *State v. Norman*, 2 Dev. 222.

29. It is no defence that subsequently to the second marriage the first had been dissolved by the decree of a competent court, under the New York statute, for a cause other than the adultery of the defendant, though if such a decree had been obtained prior to the second marriage, the defence would have been valid. *Baker v. People*, 2 Hill, 326.

30. An indictment for polygamy, under the statute of Vermont, which alleges that both marriages were had in another state, and that the respondent has feloniously contracted with his second wife in Vermont, must allege that the second marriage was unlawful in the state where it was had; and if this allegation is omitted, judgment will, on motion, be arrested. *State v. Palmer*, 18 Vt. (3 Washb.) 570

Bribery

1. An offer to bribe a justice of the peace corruptly to decide a cause not then pending, but afterwards to be instituted before him, the bribe not being accepted or the suit instituted, though indictable at common law, is not punishable by confinement in the penitentiary, under the statute of Alabama. *Barefield v. The State*, 14 Ala. 603.

2. An attempt to bribe is a misdemeanor as much as the act of successful bribery, as where a bribe is offered to a judge and refused by him. 3 Inst. 147.

3. So it has been held, that an attempt to bribe a cabinet minister for the purpose of procuring an office is a misdemeanor. *Vaughan's Case*, 4 Burr, 2,494.

4. So an attempt to bribe, in the case of an election to a corporate office, is punishable. *Plumpton's Case*, 2 Ld. Raym. 1,377.

Burglary.

1. Where a burglary is connected with a larceny, mere possession of the stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary. *Davis v. The People*, Parker's Cr. 447.

2. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained. *Davis v. The People*, Parker's Cr. 447.

3. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny. *Ib.*

4. There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open the door, unless the entry of the trespasser be immediate, or in so short a time that the owner or his family has not the opportunity of refastening the door. Thus, where the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house without breaking any part, but through the unfastened door, with intent to commit a felony, it was held, that this was not burglary. *The State v. Henry*, 9 Ired. 463.

5. Breaking open the shutters of a window, and protruding the hand within them, is not such an entry as will constitute the crime of burglary, in Alabama, the sash and glass not being broken. *The State v. M'Call*, 4 Ala. 643.

6. An indictment for burglary must lay a felonious intent, and that intent must be proved. *The State v. Eaton*, 3 Harringt. 554.

7. In New Hampshire, upon an indictment for burglariously breaking and entering a dwelling-house, and stealing goods therein, the prisoner may be convicted of the burglary, if the larceny be proved. *Jones v. The State*, 11 N. H. 269.

8. And in such case it is not necessary to allege an intent to steal, as proof of the larceny is sufficient evidence of the intention. *Id.*

9. In an indictment on statute of Massachusetts of 1839, c. 31, which prescribes the punishment for breaking and entering in the night time a shop adjoining to a dwelling-house, "with intent to commit the crime of larceny," it is not necessary to aver the intent in the words of the statute; it is sufficient to aver that the defendant broke and entered the shop with intent to steal, take and carry away the goods and chattels of A., then and there in the shop being found. *Josslyn v. The Commonwealth*, 6 Met. 236.

10. A prisoner was charged with breaking open a house in the day time, and stealing therefrom coins of a particular denomination. After evidence tending to prove the charge, proof that the prisoner had in his possession a coin of another denomination, which was in the house when it was broken, is admissible evidence to bring home the breaking of the house to the prisoner. *Hall's Case*, 3 Gratt. 593.

11. The offence of breaking is a violation of the security intended to exclude, and when coupled with an entrance into a store, with a felonious intent, it constitutes the crime described in the Revised Statutes of Maine, c. 155, § 11. *State v. Newbegin*, 12 Shep. (25 Maine,) 500.

12. But when the store is lighted up, and the doors are latched merely, in the ordinary manner, without any fastening to exclude others, and the clerks are in the store ready to attend upon customers, and before eight o'clock in the evening, one carefully lifts the latch and enters the store by the door, with an intention to commit a larceny therein, and does so commit a larceny, secretly, and without the knowledge of the attendants in the store, it does not amount to such breaking and entering as is intended to be punished under that section of the statute. *Id.*

13. Where a defendant was indicted in two indictments, for

breaking and entering at different times, two different dwelling-houses, with intent to commit the crime of larceny therein, and with stealing therefrom, among other articles particularly described in each indictment, certain pieces of money; and, on the trial of one of the indictments, a quantity of coin, amounting nearly to the sum described in the indictment, which, with other property therein alleged to have been stolen, was found in the possession of the defendant, was produced and exhibited in evidence, and left to the jury, with instructions that if they were satisfied that the other articles which were identified were stolen by the defendant, and that soon after the breaking and entering of the house, money corresponding to the money stolen at that time was found in the possession of the defendant, with such other articles, the jury might find that the money produced, so far as it corresponded to the money stolen, was also stolen; it was held, that although proof of the identity of the money found with the money stolen was not necessary to a conviction, the instructions were correct, and that the question of identity was thereby properly left to the jury. *The Commonwealth v. Chilson*, 2 Cush. 15.

14. The defendant having been convicted on the first indictment, it was held, that the same money which was introduced as evidence on the trial thereof, might be produced and exhibited as evidence on the trial of the second, and that the prosecutor might examine the same, and might select therefrom and identify in his testimony any piece of the coin as a part of the money stolen. *Id.*

15. There must be a breaking, removing or putting aside some thing material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion. If a door or window be shut, however, it is sufficient, though it be not bolted or fastened. *The State v. Boon*, 13 Ired. 244.

16. Upon the trial, it appeared that the prisoner was a guest at an inn, and that in the night he left his own room and entered the bar-room, and stole some money therefrom. Held, that as the guest had a legal right to enter the inn and the bar-room, his subsequent larceny did not relate back and give a character to his entry, so as to make it illegal, and subject him to punishment for entering with a felonious in-

tent; and that the conviction could not be sustained. *The State v. Moore*, 12 N. H. 42.

17. In an indictment for burglary, it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling. *Ducher v. The State*, 18 Ohio, 308.

18. Proof of a constructive breaking, at common law, is sufficient to warrant a conviction under the Ohio statute, which provides against a "forcible" breaking and entering. *Ib.*

19. It having been proved that the prisoner was seen on the day after the burglary, for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home. *The People v. Larned*, 3 Selden, (N. Y.) 445.

20. The offence of breaking and entering in the night time "a house not occupied as a dwelling-house," and committing a larceny therein, constitutes only a larceny. *Wilde v. The Commonwealth*, 2 Met. 408.

21. Where the only covering to an open space in a dwelling-house was a cloak hung upon two nails at the top and loose at the bottom, and it was removed from one of the nails: *Quere*, whether that was a sufficient breaking to constitute a burglary. *Hunter v. Commonwealth*, 7 Gratt. 641.

22. In New Hampshire, an indictment for burglary may be supported by circumstantial evidence, and it is not necessary to show that the entry could not have been made in the day time. *The State v. Bancroft*, 10 N. H. 105.

23. "It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be open or be inclosed, and will maintain a common indictment or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c., or draw any thing out of

a house through a door or window which was open before, or enter into the house through a door open in the day time, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary."

Hawk. P. C. b. 1, c. 38, §§ 4, 5.

24. Proof of breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing a latch, when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; these are all proofs of a breaking. 2 East P. C. 487.

25. On the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements found together in the possession of the defendant, at the time of his arrest, may be brought into court and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. *Commonwealth v. Williams*, 2 Caskeny, 582.

26. So, removing a stick of wood from an inner cellar-door, and turning a button. *Smith's Case*, 4 Rogers' Rec. 63.

27. Upon an indictment for burglary, the question was, whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase. The entrance to the cellar, from the outside, was by means of a flap which let down; the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been, from time to time, fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. *Russell's Case*, 1 Moody, (C. C.) 377.

28. Where the prisoner was indicted for *breaking* and entering a dwelling-house, and stealing therein, and it appeared

that he had effected an entrance by pushing up or raising the lower sash of the parlor window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a *breaking*. *Smith's Case*, 1 Moody, (C. C.) 178.

29. Where the window of a dwelling-house was covered with a netting of double twine nailed to the sides and to the top and bottom, it was held, that the cutting and tearing down the netting, and entering through the window, constituted a burglarious breaking and entering. *Commonwealth v. Stephenson*, 8 Pick. 354.

30. Whether an implement is to be considered an instrument of housebreaking, within statute 14 and 15 Vic. c. 19, sec. 1, must depend upon the purpose for which the person charged has possession of it. *Regina v. Oldham*, 14 Eng. Law & Eq. Rep. 568.

31. Any implement that is used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for lawful purposes. *Ib.*

32. Where, therefore, upon the trial of an indictment under that section, the evidence was, that the prisoner was found by night, and without lawful excuse, in possession of a number of house-door keys, and a pair of pincers, all of an ordinary description, but not in possession of any of the particular implements of housebreaking enumerated in the section, and the jury found that the prisoner at the time had the keys in his possession for the purpose of housebreaking, it was held, that he was properly convicted of the offence thereby created. *Ib.*

33. In an indictment under the Massachusetts Revised Statutes, c. 126, § 14, it was alleged, that the defendant broke and entered "the City Hall of the city of Charlestown;" this is a sufficient averment that the property of the build-

ing alleged to be broken and entered is in the city of Charlestown. *The Commonwealth v. Williams*, 2 Cush. 582.

34. In an indictment under the Revised Statutes, c. 126, § 14, for breaking and entering and stealing in any of the buildings therein mentioned, the amount or value of the property stolen is immaterial; and it is sufficient as to the stealing, if there is a larceny properly and technically charged of any of the goods alleged in the indictment to be stolen. *Id.*

35. On the trial of a person for shop-breaking in the night time, it appeared in evidence that violence had been offered to the door, and that it had been forced open. Held, that the jury might infer that the door had been duly closed on the night of the felony. *The Commonwealth v. Merrill*, Thacher's Crim. Cas. 1.

36. An indictment for burglary, in Vermont, alleged that the respondent broke and entered the dwelling-house of one person with intent to steal his goods, and, having so entered, stole and carried away the goods of another person, then and there being found. Held, that this was not a misjoinder of offences. *The State v. Brady*, 14 Vt. 353.

37. An indictment for housebreaking, under the statute of Missouri, must specify the manner of the breaking, so as to show, on the face of the indictment, the exact offence intended to be charged, and to exclude other offences of housebreaking described by the statute. *Conner v. State*, 14 Mis. 561.

38. Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. *Hall's Case*, Russ. & Ry. 355.

39. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weights only, is a breaking, although there is an outer shutter which is not fastened. *Haine's Case*, Russ. & Ry. 451.

40. So raising a window which is shut down close, but not

fastened, though it has a hasp which might be fastened. *R. v. Hyam*, 7 C. & P. 441.

41. Where a cellar-window, which was boarded up, had in it an aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and, by the assistance of others, thus entered the house, VAUGHAN, B., ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and it was not burglary. *Lewis' Case*, 2 C. & P. 628.

42. A shutter-box partly projected from a house and adjoining the side of the shop-window, which side was protected by wooden pannelling lined with iron; held, that the breaking and entering of the shutter-box did not constitute burglary. *Paine's Case*, 7 C. & P. 135.

43. An entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection; whereas if a man choose to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *Sprigg's Case*, 1 Moo. & R. 357.

44. Where large gates opened into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. *Bennett's Case*, Russ. & Ry. 289.

45. Where the prisoner opened the area gate of a house in London with a skeleton-key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. *Davis' Case*, Russ. & Ry. 322.

46. Where thieves entered a house, pretending that the owner had committed treason, in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 Hale P. C. 552, 553.

47. Where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him, it was held burglary. *Kel. 52, 53.*

48. A glass sash-window was left closed down, but was thrown up by the prisoner; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a case reserved, the judges were of opinion that this was not burglary, there being no proof that any part of the prisoner's hand was within the window. *Rust's Case*, 1 Moody, (C. C.) 188.

49. Where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure; upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the houses adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. *Eggington's Case*, 2 East P. C. 494.

50. The house of the prosecutor was in High-street, Epsom. There were two or three houses there, insulated like Middle Row, Holborn. At the back of the house was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz., a kitchen, a coach-house, a larder and a brew-house. Over the brew-house a servant boy always slept, but no one else; and in this room the offence was committed. There was no communication between the dwelling-house and these buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the

judges were of opinion that the room in question was not parcel of the dwelling-house in which the prosecutor dwelt, because it did not adjoin it, was not under the same roof, and had no common fence. GRAHAM, B., dissented, being of opinion that it was parcel of the house. But all the judges present thought that it was a distinct dwelling of the prosecutor. *Westwood's Case*, Russ. & Ry. 495.

51. The breaking open, in the night time, of a store, at the distance of twenty feet from a dwelling-house, but not connected with it, is not burglary. *People v. Parker*, 4 Johns. 424. Nor when the only connection is a fence. *State v. Ginns*, 1 Nott & M'Cord, 583.

52. But it has been held, that it may be committed in a house standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be open or inclosed. *State v. Twitty*, 1 Hayw. 102; *State v. Wilson*, Id. 242.

53. So in a store, where there is a room communicating where a clerk sleeps. *Wood's Case*, 5 Rogers' Rec. 10.

54. The prosecutor, a publican, had shut up his house, which in the day time was totally uninhabited, but at night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor that he had no intention whatever to reside in the house, either by himself or his servants, it could not, in contemplation of law, be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. *Davies, alias Silk's Case*, 2 Leach, 876.

55. Where no person sleeps in the house, it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlor, with a staircase to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother, who lived next door. Every morning he went to his shop, transacted his business, dined and staid the whole day there, considering it as his home. When he first

bought the house he had a tenant, who quitted it soon afterwards, and from that time no person had slept in it. On a case reserved, all the judges held that this was not a dwelling-house. *Martin's Case*, Russ. & Ry. 108.

56. Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in the house in which the crime is charged to have been committed, but merely visited it occasionally. *Commonwealth v. Brown*, 2 Rawle, 207.

57. Where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house and communicating internally. But it was thought to be a case of much nicety. *Sefton's Case*, 1 Russ. by Grea. 799; Russ. & Ry. 203.

58. Where, on a trial for burglary, the articles of property alleged to have been burglariously stolen, were found in the possession of M., an alleged accomplice of the prisoner, and were brought to the prosecutor and identified by him, proof of the confession of the prisoner that he and M. went to the house of the prosecutor together, and that the prisoner waited without while M. entered through the window and stole the articles, and that they then went away together, is sufficient evidence of the identity of the articles and of the guilt of the prisoner. *The People v. Boujet*, 2 Parker's Crim. Rep. 11.

59. A burglary may be committed by breaking on the inside; for, though a thief enter a dwelling-house in the night time, through the outer door being left open, or by an open window, yet if, when within the house, he turn the key, or unlatch a chamber door, with intent to commit felony, this is burglary. *State v. Wilson*, Coxe, 439.

60. Whether a guest at an inn is guilty of a burglary by rising in the night, opening his own door, and stealing goods from other rooms, has been doubted. 1 Hale, 554.

61. Burglary may be committed in a house or shop standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be inclosed or open. *State v. Langford*, 1 Dev. 253.

62. A building used with a dwelling-house, and opening into an inclosed yard belonging thereto, was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and although it had no internal communication with the dwelling-house. *R. v. Lithgo*, Russ. & Ry. 357.

63. The cabin of a vessel is a "shop," and a barn not connected with the mansion-house is an "out-house," within the meaning of the Connecticut statute for the punishment of burglary. *State v. Carrier*, 5 Day, 131.

64. The general rule is, that if an out-house be so near the dwelling-house that it is used with the dwelling-house as appurtenant to it, though not within the same inclosure, burglary may be committed in it. *State v. Twitty*, 1 Hayw. 102.

65. The breaking into a store in the night time, when there was no fence inclosing the dwelling-house and the store, so as to bring them under one inclosure, and when the two were twenty feet apart, was held to be no burglary. *People v. Parker*, 4 Johns. 423.

66. But where it is the practice of the owner and his servants occasionally to sleep in such store, the case is different. *State v. Wilson*, 1 Hayw. 242.

67. A building separated from a dwelling-house by a public road, however narrow, was held not to be a parcel of the dwelling-house, if there was no common fence or roof to connect them, though it were held by the same tenure, and though some of the offices necessary to the dwelling-house adjoined it, and though there was an awning extending from it to the dwelling-house. But if it be made a sleeping place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house. *Ammon v. State*, 3 Humph. 379.

68. A house in which a member of the family slept, used

for the sale of goods, was held not to be part and parcel of the mansion-house, though within thirty feet of it, and within a common inclosure. *Id.*

Cheating.

1. In order to support an indictment at common law for cheating, the prosecutor must prove, 1. That the cheat was of a public nature; 2. The mode in which the cheating was effected; thus, if it was by a false token, the nature of such false token must be stated in the indictment and proved in evidence; 3. That the object of the defendant in defrauding the prosecutor was successful. Roscoe's Cr. Evid. 379.

2. On the trial of an indictment for obtaining money by false pretences, the prosecutor cannot prove false pretences made by a third person, alleged to have been made by the procurement of the defendant, without first showing that the defendant instigated such person to make them; and it seems that, in such cases, the order of producing the evidence is not a matter of discretion. *People v. Parish*, 4 Denio, 153.

3. Cheats, punishable at common law, may in general be described to be such cheats (not amounting to felony) as affect, or may affect, the public, and are effected by deceitful or illegal practices, against which common prudence could not have guarded. *Lambert v. People*, 9 Cowen, 588.

4. To sustain an indictment at common law for cheating by a false token, the instrument or device by which the cheat was effected must be calculated to deceive the public, that is, it must be the semblance of a public and not a private instrument; it must be such as affects, or may affect the public. *State v. Stroll*, 1 Rich. 24.

5. The doctrine is, that at common law no indictment lies for a cheat against which common prudence would not have guarded. 2 Russ. on Cr., 6 Am. ed. 286.

6. An indictment alleging that the defendants falsely pretended to a third person that a drove of sheep, which they offered to sell him, were free from disease and foot ail, and that a certain lameness, apparent in some of them, was owing

to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negating the facts represented, is good. *People v. Crissie*, 4 Denio, 525.

7. Where one, in a fictitious name, delivered to a person, to sell on commission, spurious lottery tickets, purporting to be signed by himself, and received from the agent the proceeds of the sale, he was held liable to indictment for obtaining such agent's goods by false pretences. *Com. v. Wilgus*, 4 Pick. 177.

8. Where a person got possession of a promissory note, by pretending he wanted to look at it, and then carried it away, and refused to deliver it to the holder, it was held to be a mere private fraud, and not punishable criminally. *People v. Miller*, 14 Johns. 371.

9. Where one of the representations proved was, that the defendant gave a false name, and where the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods, it was held to have been the duty of the court, either at the time or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant. *Com. v. Davidson*, 1 Cush. 33.

10. It is not necessary to a conviction that the false pretences should be the sole inducement by which the property in question is parted with; if they have a controlling influence, it is enough, although other minor considerations operate upon the mind of the party. *People v. Herrick*, 13 Wend. 87.

11. Where a purchase of merchandise is made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor, and put on board a steamboat designated by the purchaser, to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser; and where, after such delivery, the vendor, on receiving information inducing him to sus-

pect the solvency of the purchaser, expressed an intention to reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay, by means of which the vendor abandoned his intention, and the purchaser was then indicted, charged with the offence of having obtained the goods by false pretences, the representations made by him being alleged as false pretences; it was held, that the sale being complete before the representations were made, the defendant could not be considered guilty of the crime charged against him. *People v. Haynes*, 14 Wend. 546.

12. It is an essential ingredient of the offence, that the party alleged to have been defrauded should have believed the false representations to be true, otherwise he cannot claim that he was influenced by them. If, in parting with his property, &c., he was himself guilty of a crime, he is not within the protection of the statute. *People v. Stetson*, 4 Barb. 151.

13. A representation, though false, is not within the statute, unless calculated to deceive persons of ordinary prudence and discretion. *People v. Williams*, 4 Hill, 9.

14. Broad, however, as is the phrase for any false pretence whatever, it still has a legal limit beyond which it cannot be carried in this or any other case. It extends no further than to a case where a party has obtained money or property by falsely representing himself to be in a situation in which he is not, or any occurrence which has not happened, *to which persons of ordinary caution might give credit*. Where the pretence is absurd or irrational, or such as the party injured had at the very time the means of detecting at hand, it is not within the act. *Com. v. Hutchinson*, 2 Penn. Law Jour. 243.

15. Though the language of the statute—"by any other false pretence"—is, exceedingly broad, and in its general acceptation would include every kind of false pretence, and though it may be difficult to draw a line which would exclude cases where common prudence would be a sufficient protection, still, it should be so interpreted as to include cases where the representation was absurd or irrational, or where the party alleged to be defrauded had the means of

detection at hand. The object of the statute, it is true, was to protect the weak and credulous against the wiles and stratagems of the artful and cunning. But this may be accomplished under an interpretation which should require the representation to be an artful contrived story, which would naturally have an effect upon the mind of the person addressed—one which would be equal to a false token or false writing—an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard. *People v. Crissie*, 4 Denio, 529.

16. Whoever introduces a substance into bread which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although if equally spread over the mass it would have done no harm. *Dixon's Case*, 4 Camp. 12.

17. It was held, that a person who, being committed under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, although the attachment, not being for non-payment of money, the discharge was a nullity. *Fawcett's Case*, 2 East P. C. 862.

18. Where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court decided otherwise, as it related to the public revenue. *Bembridge's Case*, 6 East, 136.

19. When a man induces another, by false representations and false reading, to sign his name to a note for a different amount than that agreed upon, it has been held to be a cheat, for which he may be indicted. *Hill v. The State*, 1 Yerg. 76.

20. Where a miller was charged with receiving good barley, and delivering meal in return different from the produce of the barley, and musty, &c., this was held not to be an indictable offence. Lord ELLENBOROUGH said, that if the case had been, that the miller had been owner of a soke mill, to

which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, as not being indictable. *Hayne's Case*, 4 M. & S. 214.

Conspiracy.

1. Conspiracy is "a crime which consists either in a combination and agreement by persons to do some illegal acts, or a combination and agreement to effect a legal purpose by illegal means." *Reg. v. Vincent*, 9 C. & P. 91.

2. Lord DENMAN, C. J., said, "An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means." But upon this dictum being cited in *Reg. v. Peck*, 9 A. & E. 686, his lordship said, "I do not think this antithesis very correct." In *Rex v. Jones*, 4 B. & Ad. 345; 1 N. & M. 78, however, several learned judges gave a similar definition of the crime of conspiracy. 2 Russ. by Grea. 675.

3. To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete. *March v. The People*, 7 Barb. 391.

4. The obtaining possession of goods under the pretence of paying cash for them, on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, is such a fraud or cheat as may be the subject of a conspiracy. *Commonwealth v. Eastman*, 1 Cush. 189.

5. The conspiracy or agreement among several, to act in concert for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally

speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. 1 East P. C. 96.

6. Where a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party, on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case said to fall within *Rex v. Hunt*, 3 Barn. & Ald. 566.

7. Where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. *Reg. v. Frost*, 9 C. & P. 129.

8. Upon an indictment for conspiracy, the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case, circumstantial. 2 Stark. Ev. 232.

9. If, on a charge of conspiracy to annoy a broker, who distrained for church rates, it be proved that one of the defendants (the other being present) excited the persons assembled at public meeting to go in a body to the broker's house, evidence that they did go is receivable, although neither of the defendants went with them; but evidence of what a person, who was at the meeting, said some days after, when he himself was distrained on for church rates, is not admissible. *Murphy's Case*, 8 C. & P. 297.

10. If three combine and conspire to defraud another as a common object, the declarations and actions of one are evidence against all. *Aldrich v. Warren*, 16 Maine, 465.

11. When several persons are proved to have been associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. *State v. Loper*, 16 Maine, 293.

12. When partial proof of a combination between the prisoners has been given, what has been said or done by either of the prisoners, in planning the plot, may be proved, but what was not in pursuance of the plot cannot be taken against the other conspirators. *The State v. Simons*, 4 Strobb. 266.

13. When A. and B. were indicted for a conspiracy to defraud the creditors of B., and the *corpus delicti* was the deposit by B. with A. of a large sum of money, and the proof of this was B.'s declaration after he had been arrested by the procurement of A. and other creditors, and no receipt was proven, and all the circumstances were against such a deposit, it was held, that the proof was wholly unsatisfactory to support the indictment, though there was some evidence that A. had aided B. to procure his discharge in solvency. *Ib.*

14. The letters of one of the defendants to another have been, under circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. *Whitehead's Case*, 1 Dow & Ry. N. P. 61.

15. In an indictment for conspiring to defraud D. *and others*, which charged the obtaining of goods of D. *and others*, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D. is admissible. *Reg. v. Steele*, 2 Moody, (C. C.) 246.

16. In prosecutions for criminal conspiracies, the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration, the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy, would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural anxiety of avoiding detection teaches men so circumstanced to envelop themselves, and to trace their movements from the slight, but often unerring marks of progress, which the most adroit cunning cannot so effectively obliterate as to render them unappreciable to the eye of the sagacious investigator. It is from the circumstances attending to a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the results, not merely of individual, but

the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole, that they have sprung from a common object, and have in view a common end. The adequacy of the evidence in a prosecution for a criminal conspiracy, to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury. *Com. v. M'Clean*, 2 Parsons, 368-9.

17. All who accede to a conspiracy, at any time after formation, become conspirators. *People v. Mather*, 4 Wend. 229.

18. The prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R. v. Hammond*, 2 Esp. 718.

19. Any concurrence of action, on a material point, seems to be sufficient to enable the jury to presume concurrence of sentiment; and one competent witness will suffice to prove the co-operation of any individual conspirator. *Com. v. Crowninshield*, 10 Pick. 497.

20. An indictment for conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large, or particular individuals out of their land entries, is not supported by evidence that the defendants conspired to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use, and excluding others. *State v. Trammel*, 2 Ired. 379.

21. An averment, in an indictment for a conspiracy, that the defendants conspired to defraud A., is not supported by proof that they conspired to defraud the public generally, or any individual they might meet and be able to defraud. *Com. v. Harley*, 7 Met. 506.

22. The offence of conspiracy consists in the unlawful agreements, although nothing be done in pursuance of it, for it is the conspiring which is the *gist* of the offence. *Gill's Case*, 2 Barn. & Ald. 204.

23. Any combination to obstruct, pervert or defeat the

course of public justice, is punishable as a conspiracy. Thus, a conspiracy to dissuade witnesses from giving evidence is punishable. Hawk. P. C. b. 1, c. 21, § 15.

24. A conspiracy to prevent a prosecution for felony is as much an offence as a conspiracy to institute a false prosecution. *Claridge v. Hoare*, 14 Ves. 65.

25. A conspiracy between persons in falsely pretending they were about to enter in business, whereby they obtained goods on credit, when the intention was to procure the goods, sell them at an under price and leave the commonwealth, is indictable. *Commonwealth v. Ward*, 2 Mass. 473.

26. It has been held not an indictable offence for several persons to conspire to obtain money from a bank, by drawing their checks on the bank when they have no funds there. *State v. Richie*, 4 Halst. 223.

27. The defendants were indicted for conspiring to defraud General Maclean, by selling him an unsound horse. The defendant, Pywell, advertised the sale, undertaking to warrant. Budgery, another defendant, stated to General Maclean, that he had lived with the owner of the horse, and knew him to be perfectly sound. General Maclean purchased the horse with a warranty, and soon after found that the animal was nearly worthless. The prosecutor was proceeding to give evidence of the steps taken to return the horse, when Lord ELLENBOROUGH intimated that the case did not assume the shape of a conspiracy; and that the evidence did not warrant any proceeding beyond an action on the warranty for the breach of a civil contract. He said, that if this were to be considered an indictable offence, then, instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats; and that no indictment in a case like this could be maintained without evidence of concert between the parties, to effectuate a fraud. *Pywell's Case*, 1 Stark. N. P. C. 402.

28. Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such

finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell v. The Queen*, 11 C. & F. 155.

29. In a charge for a conspiracy, if the act to be done is in itself illegal, the indictment need not set forth the means by which it was to be accomplished. If the act to be done is not in itself unlawful, but becomes so from the purposes for which, and the means by which it is to be done, the indictment must set out enough to show the illegality. *State v. Bartlett*, 30 Maine, 132.

30. Where, on an indictment for a conspiracy against A., B. and C., C. only called a witness, and examined him as to a conversation between himself and A., it was objected that the counsel for the prosecution had not a right to cross-examine him as to other conversations between C. and A.; but ABBOTT, J., said, that he could not prevent him from going into all the conversations which might affect C., though it might be a matter for future consideration whether A.'s counsel would, after such evidence, have a right to address the jury upon it. The witness was accordingly examined as to several conversations between A. and C., which principally affected the former. *Kroehl's Case*, 2 Stark. N. P. C. 343.

Counterfeiting and Forgery.

1. It is sufficient to call witnesses who have an acquaintance with the handwriting of the bank officers from a general familiarity with the bills of the bank, or from corresponding with such officers. 5 Ham. (Ohio) 5, 7; 6 Serg. & Rawle, 568.

2. Where the genuineness of a signature is questioned, the most satisfactory evidence to disprove the writing and prove it forged, is the testimony of the supposed writer himself, provided he is not an incompetent witness. Next to his evidence is the information of persons who have seen him write or been in the habit of corresponding with him. 1 Phil. Ev. 491.

3. On an indictment for passing counterfeit bills it is not necessary to call the president and cashier of the bank to prove the bills counterfeit. 2 N. II. 480; 5 Id. 367.

4. Nor is it necessary, in order to disprove the signatures of the bank officers, in such case, to call persons who have actually seen them write. 2 Pick. 47.

5. Evidence that the prisoner uttered as genuine what purported on its face to be a bank note, is competent proof that it was a bank note, though it is not otherwise shown that such a bank existed. *United States v. Foye*, 1 Curtis, 364.

6. It must be shown that a witness who is called to prove the handwriting of a person, has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. *Allen v. The State*, 3 Humph. 367.

7. In general, a document cannot be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine, and the reason is, that specimens might be unfairly selected, and calculated to serve the purposes of the party producing them, and therefore not exhibiting a just sample of the general character of handwriting. *Burr v. Harper*, Holt, 421.

8. To prove handwriting, in general, a witness must know it by having seen the person write, or having corresponded with him; but in the case of ancient deeds or papers so old that no living witness can be produced, the genuineness of handwriting may be proved by an expert by comparison with papers whose genuineness is acknowledged. *West v. State*, 2 Zabriskie, 212.

9. When handwriting is to be proved by comparison, the standard used for the purpose must be genuine and original writing, and must first be established by clear and undoubted proof. Impressions of writings taken by means of a press, and duplicates made by a copying machine are not original, and cannot be used as standards of comparison. *Commonwealth v. Eastman*, 1 Cush. 189.

10. An expert may testify whether, in his opinion, anonymous letters, written in a disguised hand and calculated to divert suspicion from the defendant, are in the defendant's handwriting, and may give his reasons for his opinion. *Commonwealth v. Webster*, 5 Cush. 295.

11. An expert who speaks from skill is not competent to

establish a forgery. *Bank of Pennsylvania v. Jacobs*, 1 Penn. 161.

12. The rule as to comparison of handwriting does not apply to the *court* or the *jury*, who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting. *Griffiths v. Williams*, 1 Cr. & J. 47.

13. But the document with which the comparison is made must be one already in evidence in the case, and not produced merely for the purpose of the comparison. Thus, where upon an indictment for sending a threatening letter, in order to prove the handwriting to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, BOLLAND, B., after considering *Griffiths v. Williams*, rejected the evidence, observing, that to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. *Morgan's Case*, 1 Moo. & R. 134.

14. Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *R. v. Longnor*, 4 Barn. & Adol. 647.

15. In a prosecution for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using ordinary caution. *United States v. Morrow*, 4 Wash. C. C. 733.

16. A person who takes base pieces of coin, which are brought to him ready made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin, and render them fit for circulation, is guilty of counterfeiting. He completes the offence, and subjects thereby to the penalties of the law, not only himself, but all who acted a part

and were present assisting in the transaction. *Rasnick v Com.*, 2 Virg. Cas. 356.

17. The staking counterfeit coin at a gaming table, as good money, is an attempt to utter or pass the same; and losing it at play is a passing of the same against law. *State v. Beeler*, 1 Brev. 432.

18. An indictment does not lie for forging a Spanish head pistareen, as it is not a coin of Spain made current by law in the United States. *United States v. Gardner*, 10 Pet. 618.

19. An indictment which alleges that the defendant had in his possession a coin, counterfeited in the similitude of the good and legal silver coins of this commonwealth, called a dollar, with intent to pass the same as true, knowing it to be counterfeit, is supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. *Com. v. Stearne*, 10 Met. 256.

20. In order to establish the charge of counterfeiting, the prosecutor must move: 1st. The act of counterfeiting; and 2d. That the coin counterfeited resembled, or was apparently intended to resemble or pass for the king's current gold or silver coin. *Roscoe's Cr. Evid.* 388.

21. In order to prove that the prisoner was guilty of counterfeiting, it is not necessary to show that he was detected in the act, but presumptive evidence, as in other cases, will be sufficient, viz., that false coin was found in his possession, and that there was coining tools discovered in his house, &c. But the evidence must be such as to lead to a plain implication of guilt. Two women were indicted for coloring a shilling and a sixpence, and the third prisoner, a man, for counselling them, &c. It appeared that he had visited them once or twice a week; that the rattling of copper money had been heard whilst he was with them; that on one occasion he was seen counting something after he came out; that he resisted being stopped, and jumped over a wall to escape; and there was found upon him a bad three shilling piece, five bad shillings and five bad sixpences. Upon a case reserved, the judge thought this evidence too slight to support a conviction. *Isaac's Case*, 1 Russ. by Grea. 61.

22. It must be proved, both that the coin in question is counterfeit, and that it resembles, or is apparently intended to resemble the king's current gold or silver coin. The fact that the coin counterfeited or resembled is the king's current gold or silver, may be proved by evidence of common usage or reputation. 1 Hale P. C. 213.

23. The question, whether the coin alluded to be counterfeit, does in fact resemble, or is apparently intended to resemble or pass for the king's current gold or silver coin, is one of fact for the jury, in deciding which they must be governed by the state of the coinage at the time. *Case of Quinn et al.*, 6 Rogers' Rec. 63.

24. Where in an indictment a four-penny piece was called *a groat*, it was held, that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and a four-penny piece were the same, the prisoner was rightly indicted, and might be convicted. *Regg v. Connel*, 1 C. & K. 190.

25. A prisoner was indicted for uttering a base coin; it was proved that he had uttered a counterfeit shilling; and in order to show a guilty knowledge, the counsel for the prosecution tendered in evidence the fact of five other counterfeit shillings having been found in his possession five days after. TAUNTON, J., after conferring with ALDERSON, B., held the evidence admissible. *Harrison's Case*, 2 Levin C. C. 118.

26. Where several persons are charged with an uttering, it must appear either that they were all present, or so near to the party actually uttering as to be able to afford him aid and assistance. Three persons were indicted for uttering a forged note, and it appeared that one of them uttered the note in Gosport, while the other two were waiting at Portsmouth till his return, it having been previously concerted that the prisoner who uttered the note should go over the water for the purpose of passing the note, and should rejoin the other two. All the prisoners having been convicted, it was held, that the two prisoners who had remained in Portsmouth, not being present at the time of uttering, or so near as to be able to afford any aid or assistance to the accom-

plíce who actually uttered the note, were not principals in the felony. *Soares' Case*, Russ. & Ry. 25.

27. Two prisoners were charged with uttering a forged note. It appeared that they came together to Nottingham, and left the inn there together, and that on the same day, between two and three hours from their leaving the inn, one of the prisoners passed the note ; both the prisoners were convicted ; the judges held the conviction wrong as to the prisoner who was not present, not considering him as present aiding and abetting. *Davis' Case*, Russ. & Ry. 113.

28. If two utterers of counterfeit coin, with a general community of purpose, go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. *Manners' Case*, 7 C. & P. 801.

29. The giving of a piece of counterfeit coin in charity was held not an uttering within the statute, although the person might know it to be counterfeit, for there must be some intention to defraud. *Page's Case*, 8 C. & P. 122.

30. A man and a woman were jointly indicted for uttering a counterfeit shilling, having about them, &c., another counterfeit shilling, knowing, &c. It appeared that they came together to a public house, and the woman, in the absence of the man, paid away the counterfeit shilling ; that on the same day the man went to another public house and offered to sell a large quantity of counterfeit shillings ; and that on the following day the prisoners were apprehended while in bed. Near the bed was found a quantity of bad half-pence ; some silver, (four shillings and sixpence,) in the man's pocket, which was good, and one shilling and sixpence bad ; and concealed under his arm was found a paper parcel of bad shillings, which, if good, would have been worth £14 ; in the woman's pocket were found a good half-crown, seven good shillings and six counterfeit shillings, like the counterfeits found in the paper under the man's arm. Upon this evidence it was insisted for the prisoners that there was no ground to convict the man, he not having uttered the shilling, nor being present at the time the woman uttered it. With respect to the woman, she could only be convicted

for the simple offence of uttering the shilling, it not appearing that, at the time of uttering it, she had any other counterfeit money about her. Both the prisoners being convicted, the judges held the conviction of the woman for the single offence good, but not good for uttering and having about her at the time other money; and as to the conviction of the man, they held it could not be supported. *Else's Case*, Russ. & Ry. 142.

31. Two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop, and there purchased a loaf, for which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was found upon her. The other prisoner, who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found upon her, wrapped in gauze paper. It was objected that the complete offence stated in the indictment was not proved against either of the prisoners, and the above case of *R. v. Else* was cited. GARROW, B., was of opinion that the prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say whether the possession of the remaining pieces of bad money was not joint. The jury found both the prisoners guilty. *Skerritt's Case*, 2 C. & P. 427.

32. Where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, if acting in concert, and both knowing of the possession. *R. v. Gerrish and Brown*, 2 Moo. & R. 219.

33. Where the prisoner is indicted as for a felony, for having in his custody or possession three or more pieces of counterfeit coin, after a previous conviction for the misdemeanor, in addition to the above proofs, evidence must be given of the previous conviction, and of the identity of the parties, according to the 9th section of the statute. Roscoe's Cr. Evid. 397.

34. Having in possession instruments for coining, with an intent to counterfeit money, is a misdemeanor at common law. *Murphy's Case*, 4 Rogers' Rec. 42.

35. An averment that the defendant *secretly* kept instruments for counterfeiting, sufficiently avers a *scienter*. *Sutton v. The State*, 9 Ohio, 133.

36. Obliterating, by erasure or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not a forgery in North Carolina. *State v. Thornburg*, 6 Ired. 79.

37. Falsely putting a witness' name to a bond not required to be attested by a subscribing witness, does not affect the validity of the bond, and is not forgery. *State v. Gherkin*, 7 Ired. 206.

38. To constitute forgery, the instrument must be such, when forged, that it does or may tend to prejudice the rights of another. *Barnum v. State*, 15 Ohio, 717.

39. The intent to defraud some one must be averred and proved, as laid. *Ib.*

40. And evidence which tends to prove that the forged instrument could not, under any state of circumstances, prejudice the rights of any one, is competent to go to the jury. *Ib.*

41. The fraudulent alteration of the settlement of a book account, with the intent to defraud the creditor, by falsely including within the terms of settlement a claim which accrued against the debtor after the settlement was in fact made, is forgery. *Ib.*

42. That such claim existed, may be proved, though there be no book of original entries, or no book account in which the items of such claim were charged. *Ib.*

43. The statute of Vermont, which imposes a penalty for having in possession any mould, pattern, die, &c., adapted or designed for coining, is intended to reach every part of the apparatus of coining, however much more might be necessary to make that effective. If, therefore, it is shown that the respondent had in his possession one-half of a mould, it is sufficient, without proof, that he had also the other half. *State v. Griffin*, 18 Vt. (3 Washb.) 198.

44. An allegation, in an indictment, that the respondent "ten pieces of false, forged and counterfeit coin and money," &c., "unlawfully and feloniously did forge, make and counterfeit," &c., is sufficient; the ambiguity arises only from the different senses in which the word "counterfeit" is used. *Ib.*

45. An indictment for having in possession counterfeit coin need not aver that the denomination of coin which was counterfeited was "current by law or usage, in this state," it being averred that the coin was one of the current silver coins of the United States. The court will take judicial notice that the current coins of the United States are current also in the state. *Ib.*

46. It is not necessary to aver, in such indictment, of what materials the counterfeit coin was made, and if averred, it need not be proved. *Ib.*

47. And for the purpose of proving such knowledge, evidence is admissible that the defendant previously passed similar counterfeit coins, although an indictment is pending against him for such passing. *Ib.*

48. So, on the trial of a person charged with passing counterfeit bank notes, it is competent to prove that he has passed other counterfeit paper, without producing it, if it be out of the jurisdiction of the court. *Reed v. State*, 15 Ohio, 217; *State v. Williams*, 2 Rich. 418.

49. On the trial of a party indicted for forging a bank note of the Bank of the State of North Carolina, the Circuit Court permitted evidence to go to the jury of a supposed attempt by the defendant, three years previously, to utter some forged notes of the Northern Bank of Kentucky. Held, that the evidence was manifestly illegal. *Morris v. State*, 8 S. & M. 762.

50. An indictment charged that A. and B., on the 1st day of March, 1847, at the city of Pittsburgh, county of Alleghany, "did falsely conspire to utter certain forged notes of a foreign bank, in the form of good notes of that bank, with the intent that said forged notes should be uttered to the citizens of this commonwealth as good notes, and with intent to cheat the foreign bank and divers citizens of this

commonwealth." Held, that in an indictment for such an offence, no overt act need be set forth; that in this indictment, time and place are well laid to give the court jurisdiction; that the words charging the intent to cheat the foreign bank were surplusage; that the offence charged in this indictment was a species of the *crimen falsi*, and was punishable by imprisonment at hard labor, under the fourth section of the act of Pennsylvania of 1790; and that it was immaterial, as regards the offence, whether the foreign bank was incorporated or not. *Clary v. Commonwealth*, 4 Barr, 210.

51. The 73d section of the New-Jersey act for the punishment of crimes, (Elm. Dig. 115,) applies to counterfeit as well as to genuine "blank and unfinished notes." *Stone v. State*, 1 Spencer, 401.

52. The averment in an indictment drawn under this section, that it is in the form and similitude of a note of some incorporated bank, is material. *Ib.*

53. If the bank be of another state, its incorporation under the laws of that state must be proved in the same manner as the statute laws of other states are proved—by a copy of the act of incorporation, duly certified, according to the act of congress, or by the production of a sworn copy. *Ib.*

54. The existence of a bank whose paper is alleged to be counterfeited, may be proved by reputation. *Reed v. State*, 15 Ohio, 217.

55. The time when a coin, of which a counterfeit is uttered and published, was current by law, usage or custom in the state, is a material ingredient in the offence denounced by the statute in Alabama, should be distinctly stated in the indictment. *Nicholson v. The State*, 18 Ala. 529.

56. In an indictment for winning a certain sum of money, the prosecution may prove the winning of a smaller sum. *Parsons v. The State*, 2 Carter, (Ind.) 499.

57. By the Indiana statute in force previously to 1843, a person who was convicted of the crime of forgery was not rendered infamous, and the provisions of the Revised Statutes of 1843 apply only to subsequent convictions of that crime. *Johnson v. The State*, 2 Carter, (Ind.) 652.

58. In prosecutions, persons of skill can be called in to testify as to the genuineness of any bank note, &c. It is not necessary that they should testify to the genuineness of the signatures. *Id.*

59. On the trial of an indictment, charging the defendant with knowingly uttering as genuine three forged promissory notes of the same tenor and date, and for the same amount, and purporting to be signed by S. F. B., the attorney for the commonwealth, having first produced three notes purporting to be signed by S. F. B., each for the same amount, and of the same tenor and date with the notes described in the indictment, and having offered evidence that they were forged by tracing thereon the signature of a genuine note, then offered in evidence thirty other similar notes which had been uttered by the defendant at or near the same time with the former, and which were also alleged to be forged in the same manner, in order to prove knowledge on the part of the defendant that the notes in question were forged; the defendant thereupon admitted that he passed the notes in question, and, if they were not genuine, that he knew that fact, and then objected to the admissibility of the evidence. It was held, that the defendant's admission did not supersede the evidence or render it incompetent; that the prosecuting officer might prove and make out the case for the commonwealth, by proper and legal evidence, without being obliged to rely upon any admission of the defendant; that if the evidence offered had any tendency to prove that the three notes in issue had been formed from one pattern by tracing, it had some tendency, and was, therefore, admissible to prove the forgery thereof in that form; and that, as the evidence was admissible to prove facts bearing upon the issue, it was no objection to it that it had also some effect to corroborate the testimony of the supposed maker, that the notes in question were forgeries. *The Commonwealth v. Miller*, 3 Cush. 243.

60. An indictment for forgery, &c., must set forth the alleged forged instrument by copy, or *fac simile*, whenever practicable, and must purport to set forth the tenor of such instrument. It is not sufficient to set them forth according

to their purport and effect. *The State v. Bonney*, 34 Maine, (4 Red.) 383.

61. Where a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged, as constituted by the alterations, or the forgery of the entire instrument may be charged. *The State v. Weaver*, 13 Ired. 491.

62. An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelt as they appear spelt in the original. *Ib.*

63. The decision of the judge below, as to the question what the instrument contains, to be decided by inspection, cannot be received in the Supreme Court. *Ib.*

64. Whether a witness, who has been examined, shall be re-examined, is a question of discretion for the judge below, and from his decision no appeal lies. *Ib.*

65. Where, on the trial of an indictment for uttering as genuine a forged promissory note, the supposed maker testified that he had never given any one his name in blank, so that a note could be written over his signature, it was held, that the testimony of a witness, that he once saw a blank paper, on which a note was filled up in his presence, purporting to have the endorsement of the supposed maker upon it, was not admissible to contradict the testimony of the latter, unless such endorsement was first proved to be a genuine signature. *The Commonwealth v. Miller*, 3 Cush. 243.

66. The supposed maker of certain promissory notes alleged to be forged, having testified on the trial of an indictment for uttering the same, that he had given the defendant one note of the tenor of those mentioned in the indictment, and but one, and that the notes given in the course of his business in Boston were entered in the books kept by his clerk; and the clerk having testified that he kept an account of the supposed maker's transactions in Massachusetts, and that he knew of the latter's giving one note corresponding with the description of the notes set forth in the indictment, the prosecuting officer proposed to inquire of the clerk

whether he knew of the supposed maker's giving the defendant any other such note than the one he had mentioned ; it was held, that the term "such" did not limit the inquiry to a note of a particular tenor or purport, but to the giving of any note of a like kind, and that the question was, therefore, admissible. *Ib.*

67. The supposed maker of notes, alleged to be forged, having testified, on the trial of an indictment for uttering the same, that all the notes given by him, prior to the date of the notes alleged to be forged, were entered in the books kept by his clerk ; and the defendant having introduced evidence to prove that there were confidential transactions between him and the supposed maker, in which the latter had given him notes to be negotiated for his own accommodation, which were not intended to be entered, and would not appear on the books kept by the clerk ; it was held, that the prosecuting officer, in order to rebut this testimony, might introduce evidence to show, that three notes which had not been entered on the books of the clerk, but which had been negotiated by the defendant, were all taken up and paid by the latter, a short time before their maturity. *Ib.*

68. On the trial of an indictment, charging the defendant, in three counts, with uttering three forged promissory notes of the same tenor, if three such notes are introduced in evidence, it is not necessary for the prosecuting officer to show upon which of them each of the counts in the indictment was found, each count being provable by either of the three notes. *Ib.*

69. A. gave a receipt to B., acknowledging the receipt of money "in part" payment, and such receipt was subsequently altered, so as to read in "full up to date." Held, that such alteration was a forgery, as forgery consists in altering the paper in a material part, to the injury of another, as well in whole as in part. *The State v. Floyd*, 5 Strobb. 58.

70. The prisoner forged and delivered as genuine to B., who owed money to A., a letter, purporting to be written by A., and addressed to B., in which, after setting out the amount due from B., A. was made to say, "Sir,—I hope you

will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling." Held, that the document was a forged "warrant" for the payment of money within the meaning of the statute 11 Geo. IV. and 1 Wm. IV. c. 66, s. 3. *Regina v. Dawson*, 1 Eng. Law & Eq. Rep. 589.

71. *Seemle*, that it was also a forged "order" for the payment of money. *Ib.*

72. The indictment charged the prisoner with uttering, knowing the same to be forged, a certain warrant, order and request for the delivery of goods in the words and figures following: "Mr. B., — S., Pleas sen by bearer a quantity of basket nails a clasp. E. L." It was proved that E. L. was a customer of B.'s, and had employed the prisoner in his service; and that the prisoner had delivered to B. a paper, as set forth in the indictment, which was a forgery of E. L.'s handwriting. The prisoner was convicted. On a case reserved, it was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order and request. Held, that there was no variance, as the document being set out *in hæc verba* in the indictment, the description of it therein became immaterial. *Regina v. Williams*, 2 Eng. Law & Eq. Rep. 533.

73. In an indictment for forgery, a variance between the count and the forged instrument, in the spelling of a name, is unimportant, if the same sound is preserved. *State v. Bean*, 19 Vt. (4 Washb.) 530.

74. Where the averments, in an indictment for forgery, improperly describe the import of the obligation of the contract forged, this defect is not cured by reciting the instrument *in hæc verba*; but a note in these words, "For value received, I promise to pay Mr. Frank Wilson, or order, the sum of \$25 60, *to bade* the first day of January next, and interest," sufficiently imports that it is made payable the first day of January next ensuing its date, and will support an averment to that effect in an indictment for forgery. *Ib.*

75. To support an indictment against the defendant, for

having in his possession a counterfeit bank bill, knowing it to be counterfeit, and with intent to pass the same as good, the government must prove the possession, knowledge and intent to pass, and proof of possession is not sufficient to throw on the defendant the burden of explaining his possession, and that he did not intend to pass the same. *Brown v. People*, 4 Gilm. 439.

76. Where the prosecutor, in an information against A. for putting off a counterfeit bank bill, knowing it to be counterfeit, having given evidence to prove that A. and B. had entered into a conspiracy to put off counterfeit bills similar to the bill described in the information, attempted to show that A. knew the bill in question to be counterfeit, and for this purpose he offered evidence to prove that at two different places, a day or two previous to the alleged offence, and at another place soon after its commission, B. put off other counterfeit bills of the same bank, A. being in company with B. immediately before and after such putting off by B., but not actually present with him at those times, it was held, that the whole of such evidence was proper to go to the jury, and if they were satisfied that such conspiracy existed between A. and B., and that B., in pursuance thereof, put off such counterfeit bills in the manner stated, these acts of B. were as strong evidence against A. to prove his knowledge of the bill in question being counterfeit, as though he had personally done the same acts. *The State v. Spalding*, 19 Conn. 233.

77. An indictment charged that the obligor paid five dollars on a single bill to the obligee, and that the obligee endorsed on the single bill a credit in the following words: "Received, 23d October, 1841, five dollars," and that the defendant obliterated the same, with intent to prejudice the rights of the obligor. Held, that this indictment did not make out a valid charge of forgery, there being no averment that such endorsement, by the agreement of the parties, was to have the force and effect of a formal receipt or acquittance, for the purpose of making it evidence of payment. *The State v. Martin*, 9 Humph. 55.

78. An indictment for fraudulently passing counterfeit

money, must charge an intent to defraud the person to whom it was passed; and to sustain such indictment, it must appear that the money was delivered with a knowledge of its character, and with the intent to defraud the person to whom it was passed; and the indictment will not be sustained by proof of a sale of counterfeit money to a person who knew it to be counterfeit. *Hooper v. State*, 8 Humph. 93.

79. An indictment for keeping or passing counterfeit paper money must set out, in words and figures, the money so passed and kept, except when the money has been destroyed or kept by the defendant, or cannot be produced, and then the indictment must set forth the fact of such destruction or keeping, &c. *Ib.*

80. An indictment for forging an order for nineteen dollars is supported by evidence that the order was originally made for nine dollars, and genuine, and that it had been altered to nineteen dollars. *State v. Fly*, 26 Maine, (13 Shep.) 312.

81. On an indictment for forging an order "purporting to be made and drawn by E. C. and J. S., selectmen of the town of M.," it is not necessary, to sustain the indictment, to prove that E. C. and J. S. were selectmen of M. *Ib.*

82. In an indictment for the forgery of an order, it is not necessary to set out figures and characters in the margin of it. *Ib.*

83. On the trial of an indictment for forging an order, it appeared in evidence that the order alleged to be forged was originally genuine, and altered to a greater sum; the court instructed the jury, "that if it was proved that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burden of proof was on the defendant to prove that he did not alter it." Held, that this was erroneous, and that it should have been left to the jury to decide on all the evidence. *Ib.*

84. It is not necessary to constitute a forgery of an order for the delivery of the goods, within the first section of the seventh division of the penal code of Georgia, that the person whose name is forged has goods in the hands of the drawee. *Hoskins v. The State*, 11 Geo. 92.

85. Upon an indictment for forgery, it is competent to prove that the writing was actually passed, in order to establish the fraudulent intent with which it was made. *Ib.*

86. Offences which differ from each other, and vary in their punishment, provided they be of the same nature and differ only in degree, may be included in the same indictment and tried at the same time; as, for instance, the forging of an instrument, and the uttering and publishing it as true, knowing it to be false. *Ib.*

87. An indictment, charging the defendant with passing counterfeit coin in payment to A., will not be sustained by evidence that the defendant passed it in payment to B., through A., who was the innocent agent of the prisoner in the transaction. *Rouse v. State of Georgia*, 4 Geo. 136.

88. Proof of the passing, in payment, of base metal, in the likeness or similitude of gold coin, will not support an indictment for passing in payment "counterfeit gold coin." *Ib.*

89. In an indictment against one for fraudulently keeping in his possession a fictitious instrument purporting to be a bank note, it is necessary to aver an intent to utter or pass it, as and for a genuine bill. *Gabe v. State*, 1 Eng. 519.

90. It is not necessary to set forth a copy or *fac simile* of the instrument, but it is sufficient to describe it in such a manner as to identify it. *Ib.*

91. An indictment which avers that a bank bill was false, forged, altered and counterfeit, is repugnant. *Kirley v. The State*, 1 Ohio, 185.

92. The presentation of a forged draft or order for money, to the person to whom it purports to be directed, for payment thereof, by one knowing it to be forged, although payment is refused and the draft returned to the presenter, is an uttering and publishing within the meaning of § 2, c. 155, Michigan Revised Statutes. *The People v. Brigham*, 2 Mich. (Gibbs,) 550.

93. The uttering of a forged instrument, being punishable by imprisonment in the state prison, is made a felony by the provisions of § 18, c. 161, Michigan Revised Statutes. *Ib.*

94. A draft made payable to the bearer, no payee being

named therein, is, nevertheless, an order for money, in the meaning of the statute. *Ib.*

95. Parol proof as to the manner in which the prisoner read the note to the witness, to whom he offered it, is admissible to show the *quo animo* with which it was made and uttered. *Butler v. The State*, 22 Ala. 43.

96. A writing to these words, namely, "By the 25th day of December next, I promise date to pay to William H. Butler, or bearer, the sum of one hundred, and interest from, and two dollars, for value received of him, this February 23d, 1850. (Signed) Stephen Burns," is a promissory note within the forty-third section of the fourth chapter of the penal code, (Clay's Digest, 423, § 43,) and will sustain an indictment for forgery. *Ib.*

97. A demurrer to an indictment for forgery, on account of a variance between the instrument described therein and that offered in evidence at the trial, cannot be considered by the court, unless oyer of the instrument is craved. *Ib.*

98. Where there is a patent ambiguity on the face of the note charged to have been forged, arising from the use of words which are awkwardly, unskillfully or designedly inserted, it is the duty of the court to examine it, and to instruct the jury how it should be read. *Ib.*

99. Under an indictment for forgery, it is not necessary that there should be a literal correspondence between the instrument described in the indictment and that offered in evidence at the trial; if the correspondence is such as will prevent the prisoner from being a second time put in jeopardy for the same cause, should he be acquitted, or from being a second time punished, should he be convicted, it is sufficient. *Ib.*

100. If one pass counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. *The State v. Mix*, 15 Mis. 153.

101. It is competent for the state to prove, after having shown that the defendant had passed a bank note which was counterfeit, as charged in the indictment, in order to show guilty knowledge in the defendant, that he had passed other

counterfeit bank notes of a similar kind, to other persons at different times, before and subsequent to the indictment. *Ib.*

102. A county warrant is such an instrument or writing as may be forged, under the statute of Missouri concerning crimes and punishments. *The State v. Fenly*, 18 Mis. (3 Bennett,) 445.

103. Where a party is charged with altering or forging a county warrant, it is sufficient to allege in the indictment that he falsely altered and forged the warrant, &c., intending to defraud, &c., setting forth the warrant *in hæc verba*, without alleging, in the words of the statute, that it was an instrument or writing, being, or purporting to be, the act of another, by which a pecuniary demand or obligation was, or purported to be, transferred, created, &c., or by which rights of property were, or purported to be, transferred, &c., or in any manner affected. *Ib.*

104. A written instrument, to be the subject of indictment for forgery, must be valid, if genuine, for the purposes intended ; if void or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated of it. *The People v. Harrison*, 8 Barb. Sup. Ct. 560.

105. An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owner to deliver them to the bearer, the latter having induced the owner so to send the goods, by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them. *Harris v. The People*, 9 Barb. Sup. Ct. 664.

106. And it is sufficient to allege in the indictment that the forgery was with intent to defraud the persons to whom the goods were sent, and to whom the order was directed. *Ib.*

107. A charge in an indictment for forgery, that the defendant had forged a promissory note, described in the indictment as a note without a seal, is not supported by evidence tending to prove that the defendant had committed forgery of a note under seal ; nor is such evidence admissible. *Hart v. The State*, 20 Ohio, 49.

108. In an indictment for passing counterfeit money, the name of the person to whom it was passed should be set

forth with certainty when known, and if not known, that fact should be stated. *Buckley v. State*, 2 Greene, (Iowa,) 162.

109. An indictment for forging a deed need not set forth the interest of the person alleged to be defrauded in the land conveyed; it is sufficient, if it appear that by possibility the party may be defrauded. *West v. The State*, 2 N. J. 212.

110. In such a case it is admissible to show that the defendant claimed title to the land through a different instrument from the one forged before the uttering of it, and was informed that no such document was in existence. *Id.*

111. Upon the trial of an indictment under §§ 4 and 5, c. 216, Revised Statutes, for counterfeiting or passing a bank bill, purporting to be issued by any bank, it is not necessary to prove the existence of the bank. *The State v. Hayden*, 15 N. H. 355.

112. The first count in an indictment charged the prisoner with passing as true a counterfeited promissory note, and described the note, which purported to be issued by the Globe Bank of New York. Held, that this was an indictment under the 2d section of chapter 216, Revised Statutes, for passing a counterfeited promissory note, and was not an indictment under the 5th section for passing a counterfeit bank bill; that the two offences subjected the offender to different punishments, and were distinct; and that the evidence did not prove the offence laid in the first count. *Id.*

113. The second count charged the prisoner with passing as true a counterfeit writing, purporting to contain evidence of the existence of a debt, &c., describing the writing, which purported to be a bill issued by the Globe Bank of New York. Held, that the indictment was founded upon the first section, whereas it should have been under the fifth section of chapter 216; that the two sections provided different punishments, and the offences mentioned in them were distinct; and that the evidence did not prove the offence laid in the second count. *Id.*

114. An indictment for forgery set forth a note, calling it a negotiable promissory note, in its exact words; but no count in the indictment set forth any endorsements. A note with endorsements was offered in evidence. The words of

promise were, "I promised," and it was proven that a certain bank, to which the note was offered, would not, if it had been genuine, have discounted it, on account of its defective form. Held, that it was no variance between the charge and the proof, that no endorsements were set forth in the indictment, and that the note offered sustained the charge; nor was it any objection that the word "promise" was in the past tense, and that the bank would not discount the note on account of defect of form. *Perkins v. Commonwealth*, 7 Gratt. 651.

115. Where an indictment charged that A. did feloniously and fraudulently forge a certain writing, as follows—"Mr. Bostick, charge A.'s account to us. B. & C."—with intent to defraud B. & C., it was held, that the indictment was not valid without charging that A. was indebted to Bostick, as there could be no fraud unless a debt existed. *State v. Humphreys*, 10 Humph. 442.

116. A. made the following order: "Mr. Bostwick, charge A.'s account to us. B. & C." Held, that if this instrument were genuine, it constituted a valid undertaking by B. & C. to pay A.'s debt, without the statement of a consideration; and the fraudulent making of such instrument was a forgery under the penal code of Tennessee. *Id.*

117. The number and check-letter of a forged bank bill, and the words in the margin, need not be set forth in an indictment for uttering and passing it as true. *Commonwealth v. Taylor*, 5 Cush. 605.

118. On a trial at Northampton, for uttering as true a forged bank bill, purporting to be a bill of a bank at Worcester, a witness having testified that he knew the president of that bank; that when the witness last saw him, which was something less than a year before, he lived in Worcester, and that he then told the witness that his wife had bought a place in Oxford, in the state, and his family were going there to reside; it was held, that upon this evidence, the testimony of the president might be dispensed with, and the forgery of his signature allowed to be proved by other witnesses, within the Massachusetts Revised Statutes, c. 127, § 10. *Id.*

Embezzlement.

1. A person who is employed to collect bills for the proprietors of a newspaper establishment, and converts to his own use the money which he collects for them, is not such an agent or servant as is intended by the Revised Statutes of Massachusetts, c. 126, § 29, which prescribes the punishment of embezzlement by agents and servants. *Commonwealth v. Libbey*, 11 Met. 64.

2. The phrase "money or property of another," in the Revised Statutes of Massachusetts, c. 126, § 9, providing that, "if any clerk, agent or servant, &c., shall embezzle, &c., without the consent of his employer or master, any money or property of another," he shall be deemed guilty of larceny, applies to the money or property of the employer or master, as well as to that of any other person than the clerk, agent, &c. *The Commonwealth v. Stearns*, 2 Met. 343.

3. An auctioneer is not an agent or servant within the provision just cited. Whether he receives goods for sale in the usual mode, or on an agreement to pay a certain sum therefor within a specified time after the sale, the proceeds of his sales is his own money, and not that "of another." *Id.*

4. The duty of a servant was to go into a neighboring county, D., every Monday, and there collect moneys for his master, and to return to N., where the master lived, and to pay over what he had received on Saturday night. The servant received money for his master in county D., but did not return to his master and account on the following Saturday. Two months afterwards, his master met him in N., and asked him for the money, upon which he stated that he was sorry he had spent it. Held, that there was evidence for the jury of an embezzlement in N. *Regina v. Murdock*, 8 Eng. Law and Eq. Rep. 577.

5. If a mariner, by direction of the mate, during the permanent absence of the captain, sells a part of the cargo, to procure necessary provisions for the vessel, he does not commit such embezzlement as will amount to a forfeiture of his wages. *Anderson v. The Solon*, Crabbe, 17.

6. Embezzlement by the agent of an individual, or of a

private company, is not an offence for which the agent can be indicted under the Missouri statute of 1836, concerning crimes and punishments. *Hammuel v. The State*, 5 Mis. 260.

7. The prisoner, having been intrusted by his master with a number of articles of soldiers' clothing, for the purpose of selling them, and ten pounds in silver, to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master to say that he would send the account, together with a remittance, from Madeira. Held, that on these facts he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on account of his master; but that he might have been convicted of larceny. *Regina v. Hawkins*, 1 Eng. Law and Eq. Rep. 547.

8. An indictment which charges a larceny or embezzlement of the printed sheets of a certain publication, is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant, after he had folded, stitched, bound and trimmed them, embezzled and fraudulently converted them to his own use. In such case, the indictment should charge a larceny or embezzlement of books. *The Commonwealth v. Merrifield*, 4 Met. 468.

9. Under the Revised Statutes of Maine, c. 156, § 7, if a person, to whom property is intrusted in Maine, to be by him carried for hire, and delivered in another state, shall, before such delivery, fraudulently convert the same to his own use, the offence is punishable in Maine, whether the act of conversion be in that state or another. *The State v. Haskell*, 33 Maine, (3 Red.) 127.

10. A surety for the agent of an insurance company, not authorized to engage in banking, is not liable for an embezzlement by the agent, committed while conducting the banking operations of the corporation. *Blair v. Perpetual Ins. Co.*, 10 Mis. 559.

Gaming.

1. An indictment alleged that the defendants kept a gaming place for "money, hire, gain and reward." The proof was, that it was the general custom for the party defeated to pay for the use of the tables—one shilling for each game. Held, that this was gaming for money within the meaning of the statute. *The State v. Leighton*, 3 Foster, (N. H.) 167.

2. Where the indictment alleges that the names of the persons who played the game are unknown to the grand jurors, (which may be done where true, not carelessly,) such allegation is a material one, is traversed by the plea of not guilty, and must be sustained by proof. *Barkman v. The State*, 8 Eng. (13 Ark.) 703.

3. In an indictment for betting at poker, or any of the small games embraced in the eighth section of the gaming act, it is necessary to state the names of the persons by whom the game was played, by way of identifying the offence. *Id.*

4. The defendant was indicted for betting at a game of cards called poker, and convicted on testimony that the game on which he bet was called draw poker, and different in some respects. The court below having refused a new trial, the evidence on this point was held sufficient to uphold the verdict. *Id.*

5. Where there is a variety of games of cards of the same kind, of the kind called poker for instance, and a person is indicted for betting on a game called poker, the indictment is sufficient. *Id.*

6. In an indictment under the act of 1834, for gaming with a slave, it is not necessary to allege nor to prove what the game played was, or that there was any betting. It is sufficient if the indictment alleges that the defendant "willfully and unlawfully did game with a certain negro slave," &c., and it is sufficient to prove that he played at cards with him. *The State v. Laney*, 4 Rich. 193.

7. An indictment was for playing at a game with cards, at a public place, upon which money was bet; the proof was that property was bet; and it was held, that the indictment

was not sustained by the proof. *Hale v. The State*, 8 Texas, 171.

8. The circumstances which go to constitute the offence must be set out; and they must be truly stated, so that the averments and proofs may reciprocally meet and conform to each other. *Ib.*

9. An indictment, charging that the accused "did play and bet at cards for money, at a game of poker, whist, faro, seven-up, three-up, and other games played with cards," using the words of the statute, was held good. *Wingard v. The State*, 13 Geo. 396.

10. A loser on a horse race may recover his stake from the stakeholder, provided he demands it before it is paid over to the winner. *Bledsoe v. Thompson*, 6 Rich. 44.

11. An indictment for betting money on a game of cards is not sustained by proof of betting property. *Horton v. The State*, 8 Eng. (13 Ark.) 62.

12. The owner or occupant of a house, &c., cannot be indicted, under the 4th section of the gaming act, for permitting poker, or any of the small games of cards mentioned in the 8th section of the act, to be played in his house, &c., but only for suffering some of the games, tables, banks, &c., embraced in the previous sections, to be played, carried on, exhibited, &c., therein. *Stith v. The State*, 8 Eng. (13 Ark.) 680.

13. Under the act of 1824, c. 5, in Tennessee, grand juries have the power to have witnesses brought before them by subpœna, and require them to disclose all gaming within their knowledge, which may have taken place in the county within six months; and they may, upon such information, demand an indictment in due form, and return it to court without a re-examination of the witnesses. *State v. Parrish*, 8 Humph. 80.

14. Where a physician, and a few friends present by invitation, played cards or dice at night, with closed doors, in his office, where he exhibited his medicines, received professional calls at all times, and, being unmarried, ate and slept, it was held, that the office was not a public place, within the statute of Alabama against gaming. *Clarks v. State*, 12 Ala. 492.

15. A steamboat is a public place, within the meaning of the statute of Alabama against unlawful gaming. *Coleman v. State*, 13 Ala. 602.

16. On an indictment, under the statute of Mississippi, for betting on an election, it will not relieve him from the penalty imposed by the act, by showing that he did not himself make the bet, but procured another to make it for him. *Williams v. State*, 12 S. & M. 58.

17. An indictment for betting for money is not sustained by proof of betting of United States treasury warrants. *Ib.*

18. Concluding an indictment of a gaming house as a common nuisance, "contrary to the form of the statute," will not vitiate, when it is coupled with an allegation that the offence charged was a "common nuisance," and a further conclusion "against the peace and dignity of the state." The words, "contrary to the statute," &c., will be regarded as surplusage. *Vanderwerker v. The State*, 8 Eng. (13 Ark.) 700.

19. Independent of any statute, keeping a common gaming house is an indictable offence at common law, such an establishment being a nuisance. *Ib.*

20. It has been held that a general charge, that the defendant kept and maintained a common gaming house, would be sufficient, though the better opinion is that a further allegation, in general terms, of what was transacted there, is necessary; but it is not essential to specify what particular games were carried on by the visitors. *Ib.*

21. Where a number of defendants are joined in a count for betting at faro, or any such game, it is proper to charge that they severally bet, to make the indictment available, though the court would not encourage the joinder of persons severally committing the same species of offence, as it produces inconvenience. *Johnson v. The State*, 8 Eng. (13 Ark.) 684.

22. Where an indictment charges several persons with a joint betting at a faro bank, the proof must correspond with the allegation, and show that all the persons named were concerned in the betting. *Ib.*

23. Where an indictment containing four counts charges

the defendant with playing "cards at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," while the evidence shows that the playing took place in a hollow more than a hundred yards from a house where spirituous liquors were retailed, and where the persons present had been drinking; that the persons playing, of whom the defendant was one, could not be seen from the grocery nor from the public road; that witness had never seen, before nor since, any playing, or signs of persons having played at that place before, the evidence will not support either count in the indictment. *Smith v. The State*, 23 Ala. 39.

24. It is not necessary, in order to constitute a violation of the statute, that the billiard table should be kept in the same room, or under the same roof, where the spirituous liquors are retailed; if the one is contiguous to the other, and forms part and parcel of the same establishment, it falls within the statute. *Smith v. The State*, 22 Ala. 54.

25. The offence of gaming is complete by playing once, and does not require a repetition of it. *Cameron v. The State*, 15 Ala. 383; *Swallow v. The State*, 20 Ala. 30.

26. It is not error to charge the jury "that if they believed, from the testimony, that the defendant played cards at the house mentioned by the witness, and that it was, at the time, a house to which people did resort, then the defendant was guilty." *Ib.*

27. Any place, which for the time is made public by the assemblage of people, is a public place within the meaning of the act against gaming. *Campbell v. The State*, 17 Ala. 369.

28. The allegation in an indictment for playing at cards, in a public place, to whom the house or other place belongs, is not necessary, and if inserted, may be treated as surplusage. *Wilson v. The State*, 5 Texas, 21.

29. The plea of "guilty" to an indictment is only an acknowledgment of the facts set forth therein; it is for the court to decide whether those facts constitute an offence. *Crow v. The State*, 6 Texas, 334.

30. Betting on a game of ten pins is not an indictable offence. *Ib.*

31. An infirmary is a public place within the statute against gaming. *Flake v. The State*, 19 Ala. 551.

32. Where a party, indicted under the statute against gaming, is charged with playing cards "at a public place," proof of his playing in "a public highway" does not support the charge, as laid in the indictment, and will not authorize a conviction. *Bush v. The State*, 18 Ala. 415.

33. A room in the second story of a two-story house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors, is within the prohibition of the statute against gaming at any storehouse for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away. *Johnson v. The State*, 19 Ala. 527.

34. A back room, occupied by the register in chancery as a bedroom, adjoining the front room, which was his office, and communicating with it by a door, is not a public place within the statute against gaming, it being shown that the house was surrounded in the rear by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present, about eight in number, came by invitation from the occupier of the room, and that they entered through a back door, and not through the public office. *Roquemore v. The State*, 19 Ala. 528.

35. An unoccupied storehouse, situated in a town, and fronting on the street, if habitually resorted to by persons for the purpose of playing cards, comes within the provision of the statute against playing cards at any "out-house where people resort." *Swallow v. The State*, 20 Ala. 30.

36. A. being indicted for permitting a faro bank to be kept and exhibited in his house, it was held, that it was not sufficient to prove that he owned the house, and that the faro bank was kept and exhibited in it; positive or presumptive evidence must be given that the defendant permitted it. *Harris v. The State*, 5 Texas, 11.

37. The defendant being indicted for renting a room in his

house to certain persons to the jurors unknown, for the purpose of exhibiting and keeping a faro bank, &c., evidence must be given showing that he rented the room for that purpose. *Ib.*

38. Indictment for playing cards "at a public place." The proof showed that there was a large assembly of persons on a public day at a certain storehouse in the country. The defendants, five in number, "went into a piece of woods where the undergrowth was very thick, and into a deep hollow in said woods, about four hundred yards from said store, and out of sight of any road," and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place, and took part in the game, one of whom testified, that, when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but that during the previous year he had known persons to play "in the piece of woods," some fifty or one hundred yards from "said hollow." Held, that the playing was not "at a public place." *Bythwood v. The State*, 20 Ala. 47.

39. A neighborhood road is a "public place," within the statute against gaming, it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time. *Mills v. The State*, 20 Ala. 86.

40. The term "highway," as used in the statute against gaming, means a public road, one dedicated to and kept up by the public, as contra-distinguished from a private way or neighborhood road. *Ib.*

41. The assemblage of eight or ten persons by invitation, at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not constitute such house or room "a public place," within the statute against gaming. *Coleman v. The State*, 20 Ala. 51.

42. If the occupants of a room are in the constant habit of inviting a number of persons to their room for the purpose of playing cards, and others are allowed to come uninvited without any restraint, it is testimony tending to

prove the room "a public place," and the jury may so find it. *Ib.*

43. An indictment for keeping a gaming house is not bad for charging that the defendant kept and suffered his house to be used for gaming, &c.; otherwise, if the allegation is used in the disjunctive. *Dormer v. The State*, 2 Carter, (Ind.) 308.

44. Such individual need not state the names of the persons who played in the house; and, if stated, it is not necessary to prove every name alleged. *Ib.*

Homicide.

1. A blow with a dangerous weapon, calculated to produce, and actually producing death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder. *United States v. McGlue*, 1 Curtis C. C. 1.

2. The law does not put an act done upon a sudden impulse, and in the heat of passion, on the same footing in regard to guilt, with a deed deliberately performed. This indulgence proceeds on the supposition that the reason or judgment of the party perpetrating the act has been temporarily suspended or overthrown by the sudden access of violent passion. *Preston v. The State*, 25 Mis. 383.

3. But a high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. The excitement and anger must be superinduced by some insult, provocation or injury, which would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation. *Ib.*

4. An indictment charged that William R. Morris was murdered by the prisoner, and the proof was, that W. R. Morris was slain by him; and it was held, that the proof of identity was well left to the jury, and that a verdict of guilty found by them ought not to be disturbed. *Mitchum v. The State*, 11 Geo. 615.

5. On an indictment for murder, before the Superior Court

in the county of Stewart, the proof was that the crime was committed in the house of the witness at Florence, Stewart county; and it was held, that the proof was sufficient that the crime was committed within the jurisdiction of the court. *Ib.*

6. On a trial for murder, one witness testified, "that prisoner stooped down, and as witness heard a rattling on the floor, and did not see the knife afterwards, he supposed that prisoner picked it up. Prisoner rose with a six-barrelled pistol in his hand, presented it at the breast of deceased, not more than six inches distant, took deliberate aim, long enough to count ten or fifteen, before he fired. He fired the pistol about the right nipple. Deceased brought a groan, his face contracted, fell upon the floor, and in about five minutes expired." It was held, that the killing was sufficiently proved. *Ib.*

7. If one is killed by another by a pistol shot, and the slayer formed the intention to shoot but one moment before the firing, this is evidence of express malice, provided that there was no assault upon the person killing, or other attempt to harm by a violent personal injury by the deceased. *Ib.*

8. Where a homicide is proved, the presumption is, that it is murder in the second degree. If the prosecutor would make it murder in the first degree, he must establish the characteristics of that crime; and if the prisoner would reduce it to manslaughter, the burden of proof is on him. *Hill's Case*, 2 Gratt. 594.

9. A mortal wound, given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie* willful, deliberate and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances, the rule of law being; that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act. *Ib.*

10. The court, on a trial for murder, having charged the jury as to the different grades of homicide, and the evidence requisite to prove them, is not bound, on the motion of either party, to repeat the same charge in substance, though varied

in terms, where refusing to do so could work no injury to the party asking it, and compliance would only confuse the jury. *Stanton v. The State*, 8 Eng. (13 Ark.) 317.

11. During the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was, by order of the court, placed upon a pallet. During a part of the time he was in a drowse, and did not fully comprehend the whole of the argument, though he had understood the whole of the evidence, and all that had been said by counsel previously. The fact that he was asleep was known to the prisoner at the time, but the attention of no one was called to it. Held, that this was not sufficient cause for setting aside the verdict. *Baxter v. People*, 3 Gilm. 368.

12. The characteristic ingredient in the offence of murder in the first degree, is the existence of a specific intention to take life; and if that intention be deliberately and coolly formed and acted upon, and death ensue, the intervention of provocation between the formation of the purpose to take life and the slaying will not reduce the offence to manslaughter. *Clark v. State*, 8 Humph. 671.

13. It is error for the court, in its instructions to the jury, on a trial for murder, to assume that the name of the party murdered is stated correctly in the indictment, that being a question of fact for the jury. *The State v. Dillihunt*, 18 Mis. (3 Bennett,) 331.

14. When he who kills another seeks and provokes an assault upon himself, in order to have a pretext for stabbing an adversary, and does, on being assaulted, stab and kill him, such killing is not excusable homicide in self-defence. *Stewart v. The State*, 1 Ohio, 66.

15. It is not error to instruct the jury "that they may and ought to take into consideration the manner by which and purposes for which the prisoner had possession of the knife," with which he committed the homicide. *Ib.*

16. An indictment for murder stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on until the 8th November, in the year aforesaid, and then said, "on which 8th day of *May*, in

the year aforesaid, the deceased died." To this indictment the prisoner pleaded not guilty. Held, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death subsequent to the 7th November, or be cause for arresting the judgment. *Ailstock's Case*, 3 Gratt. 650.

17. If the act of a person, which produces the death of another, be attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the person's mind at the time he committed the act. *State v. Smith*, 2 Strobb. 77.

18. Where the prisoner fired a loaded pistol at a person on horseback, and declared he did so only with the intention to cause the horse to throw him, and the ball took effect on another person, and produced his death, it was held that the crime was murder. *Id.*

19. What is a sufficient provocation to make what would otherwise be murder a less offence, is a question of law. *The State v. Dunn*, 18 Mis. (3 Bennett,) 419.

20. In a trial for murder, the prosecution is not restricted to the list of witnesses furnished to the prisoner before his arraignment; but the court may, in the exercise of a sound discretion, permit the prosecution to introduce other witnesses. *Gates v. The People*, 14 Ill. 433.

21. On a trial for murder, if there is any doubt as to the grade of the offence, it is the duty of the court clearly to define the several grades of homicide, leaving the jury to find from the evidence of what particular grade the defendant is guilty. *Crawford v. The State*, 12 Geo. 142.

22. In an indictment for murder, a doubt must be serious and substantial, in order to work an acquittal, not the mere possibility of a doubt. *Commonwealth v. Harman*, 4 Barr, 269.

23. Proof that the violence inflicted by the defendant was the cause of the death of the deceased is necessary, though positive proof that life continued to the moment of the fatal blow is not always necessary. The presumption that a

person proved to have been alive at a particular time is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof. *Ib.*

24. Where, on an indictment for murder, a sufficient legal provocation, at the time, to extenuate the homicide, is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of the immediate provocation, but of a pre-existing malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to. *State v. Barfield*, 7 Ired. 299.

25. Where the fact of the killing by the prisoner is proved, the rules which regulate the application of circumstantial evidence to cases of homicide, where there is no positive proof of killing, do not apply, and the court are not bound to instruct the jury as to the nature and application of these rules, though the instructions asked are, as abstract propositions of law, legal and proper. *McDaniel v. State*, 8 S. & M. 401.

26. Where the fact of the killing by the prisoner is clearly proved, evidence of his character for peace or violence is inadmissible; if, however, his guilt is doubtful, it seems that such testimony is admissible, and that it is not confined to his general character, though it is of little weight, and may be rebutted by testimony on the part of the prosecutor. *Ib.*

27. On a trial for murder, where the defence of insanity is set up, and is left doubtful upon the evidence, the court ought not to instruct the jury that insanity has been proved. *State v. Stark*, 1 Strobb. 479.

28. The jury must be satisfied, in order to acquit on the ground of insanity, that the prisoner was insane at the time of the act, and actual delusion existed at the time; mere loss of memory is not sufficient. *Ib.*

29. Where the homicide is proved, the overwhelming barbarity of the act will not be considered as affording a presumption of insanity. *Ib.*

30. On an indictment for murder, the prisoner may be found guilty of manslaughter, although it contains no count for manslaughter. *Reynolds v. State* 1 Kelley, 222.

31. A prisoner was indicted for murder in the first degree, and defended himself on the ground of insanity. Held, that if he did make out his defence, the jury were bound to find him guilty of murder in the first degree. *Baldwin v. The State*, 12 Mis. 223.

32. It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant, in such case, may, notwithstanding, be properly convicted of the offence of manslaughter. *The Commonwealth v. M'Pike*, 3 Cush. 181.

33. Where a surgical operation is performed in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will, nevertheless, be responsible for the consequences. *Ib.*

34. Though, by the laws of Ohio, there may be murder in the first and the second degree, yet an indictment for an assault with intent to kill is good, if the intent be described in the words—"with intent, in and upon him, the said W., then and there feloniously, willfully and of his malice aforethought, to commit a murder." *Sharp v. The State*, 19 Ohio, 379.

35. Though, in the indictment, it be averred that the assault was made with malice aforethought, yet the jury may convict, if satisfied by the proof, that it was made willfully and maliciously with intent to murder, but not with premeditation and deliberation, or malice aforethought. *Ib.*

36. Where it appeared in evidence on a trial for murder, that the prisoner had threatened, if the deceased took a deed of his land, which he bought at sheriff's sale, that he would kill him on the next day, a deed duly proved and registered of the land was admitted in evidence, though it would have been sufficient to have shown that the deceased professed to have a deed. *The State v. Shepherd*, 8 Ired. 195.

37. If a person, upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road and in his lawful pursuit, accepts the fight, when he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way, and it would be manslaughter. *Copeland v. State*, 7 Humph. 479.

38. If the deceased is approaching the prisoner's path with the intention of assailing the prisoner, and becomes irresolute, and stops or abandons his intention, leaving the prisoner full and unobstructed right and liberty to pass, and the prisoner brings on the attack with the design to slay the deceased, the killing will be murder in the first or second degree, according to circumstances; that is, if the killing was the result of the old grudge, and a previously premeditated intention, it would be murder in the first degree; but if it were the result of malice suddenly produced by the sight of his enemy, without premeditation, it would be murder in the second degree. *Id.*

39. Where it was proven, on a trial for murder, that the deceased and the prisoner were quarrelling, and as the prisoner approached the deceased he pitched over his head a chair, without touching him, and with no apparent intention so to do, it was held, that this was no provocation, as nothing less than an actual assault or battery, or an attempt to assault within striking distance, is a legal provocation to mitigate murder to manslaughter. *The State v. Barfield*, 8 Ired. 344.

40. Prisoners were indicted for the murder and manslaughter of A., *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal. Held, by all the judges, that the judge had

rightly so directed the jury. *Regina v. Bird*, 2 Eng. Law and Eq. Rep. 448.

41. On a plea of guilty to an indictment for murder, it must be determined by evidence whether the crime be that of murder or manslaughter, and the examination of witnesses and decision of the judge must appear of record. *McCauley v. United States*, 1 Morris, 486.

42. To constitute murder in the first degree, it is not necessary that a premeditated design to kill should have existed for any particular length of time. If, therefore, the prisoner, as he approached the deceased, and first came in view of him, at a short distance, *then* formed a design to kill him, and walked up with a quick pace and killed him, without any provocation *then* or *recently* received, it is murder in the first degree. *Whiteford v. Commonwealth*, 6 Rand. 721.

43. The defence of a prisoner indicted for murder consisted, 1st. In the adultery of the deceased with the defendant's wife. 2d. In the drunkenness of the defendant; and, 3. In his insanity. Held, that only the finding of the adulterous parties in actual connection would reduce the crime of killing from murder to manslaughter, and that the knowledge of their previous adultery was no justification; that the fact of the voluntary drunkenness of the defendant was no defence; and that the question of insanity had been found against the prisoner by the jury, and that the evidence, consisting of wild declarations and drunken ravings of the prisoner about the adultery of his wife, supported the verdict. *The State v. John*, 8 Ired. 330.

44. If one, assuming to be a physician, however ignorant of the medical art, administers to his patient remedies which result in his death, he is not guilty of manslaughter, unless he has so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate, willful rashness. *Commonwealth v. Thompson*, 6 Mass. 134.

45. Where, however, such person has opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty

of manslaughter, even though he might not have intended any bodily harm to his patient. *Ib.*

46. The question, whether the weapon is a deadly weapon or not, is one of law for the court; but where it has been left to the jury, as it is for the benefit of the accused, it will not be ground for a new trial. *The State v. Collins*, 8 Ired. 407.

47. Evidence to show that the prisoner was in possession of land, and that the deceased was coming to commit a trespass upon it, cannot be received in excuse or justification of the homicide; but so far as the evidence goes to show the state of feeling of the parties towards each other, at the time the act was committed, it may be received. *State v. Zellers*, 2 Halst. 220.

48. So evidence may be given of lawsuits existing between the parties for the same purpose; but the court will not examine as to whether the proceedings were malicious or not. Nor will they inquire into the title of the land on which the act was committed, to see whether it belonged to the prisoner or the deceased. *Ib.*

49. Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own; and they can in no circumstances claim exemption from the common lot of the passengers. *United States v. Holmes*, Wallace, Jr. 1.

50. In case of shipwreck and extreme peril, where there is an absolute necessity that a part should be sacrificed in order to save the remainder, a decision by lot should be resorted to, unless the peril is so instant and overwhelming as to leave no chance of means and no moment for deliberation. *Ib.*

51. Where a person, who is neither assaulted nor threatened, gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them, this is murder. *Johnson's Case*, 5 Gratt. 660.

52. If, on the trial of a slave for murder, in North Carolina, the counsel for the prisoner does not ask the court to give to a mulatto witness, introduced on the part of the state, the

charge required by Revised Statutes, c. 111, § 51, advantage cannot be afterwards taken of the omission of the judge to make such charge. *The State v. Stewart*, 9 Ired. 342.

53. It was held to be in the discretion of the attorney-general, on the trial of an indictment for murder, to decline to call as a witness a boy who was present, if he thought him too ignorant to be competent, and that no presumption in favor of the prisoner should be created thereby. *Ib.*

54. On an indictment for murder, perpetrated by means of poison, the jury may find the prisoner guilty of murder in the second degree; and the court, upon such conviction, will inflict the punishment prescribed by law for the latter offence. *The State v. Dowd*, 19 Conn. 388.

55. It seems, that in all cases of murder, the degree of criminality must be found as a matter of fact; and without an express finding of murder in the first degree, the court would not be authorized to inflict the punishment prescribed by law for that offence. *Ib.*

56. If one counsel another to commit suicide, and the other, through the influence of the advice, kill himself, the adviser is guilty of murder as principal. *Commonwealth v. Bowen*, 13 Mass. 359.

57. The presumption of law in such case is, that the advice had the effect intended by the adviser, unless the contrary be shown. *Ib.*

58. On a trial for homicide, it is the province and duty of the court to inform the jury upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of the homicide is. *The State v. Hildreth*, 9 Ired. 429.

59. Where the state, on a trial for homicide, relies upon the ground of express malice, the witness can only prove the existence of previous malice and threats. The existence of the malice up to the time of the homicide is not capable of being directly proved by witnesses, but is an inference which may be drawn by the jury from the facts. *Ib.*

60. If a party enters a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. *Ib.*

61. Where, upon the trial of an indictment for murder, the prisoner attempts to justify the homicide on the ground that it was committed in self-defence, he must show, to the satisfaction of the jury, that he was in imminent danger either of death or of some great bodily harm ; and it is not sufficient that the accused believed that it was necessary to take the life of his assailant in order to protect himself from some great personal injury. [MULLETT, J., not concurring entirely, holds, that it would be a sufficient justification, if the prisoner had reasonable grounds for believing, from the nature of the attack upon his person, that there was a design to destroy his life, or commit a felony upon his person.] *The People v. Shorter*, 4 Barb. Sup. Ct. 460.

62. The legal meaning of malice aforethought, in cases of homicide, is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are ordinary symptoms of a wicked, depraved and malignant spirit. *United States v. Cornell*, 2 Mason, 91.

63. One who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished, although it may afterwards turn out that the appearances were false, and that there was, in fact, no such design, nor any danger that it would be accomplished ; and the Revised Statutes of New-York (2 Revised Statutes, 660, § 3, sub. 2) have not changed the law on this subject. *Shorter v. The People*, 2 Comst. 193.

64. A person is not justified in returning blows with a dangerous weapon, when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm ; nor is homicide justified when the combat can be avoided, or where, after it is commenced, the party can withdraw from it in safety before he kills his adversary. *Id.*

65. Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict ; the

other party pursued, with his arm uplifted, and, when he reached his opponent, stabbed and killed him, the latter having stopped and first struck with his fist. Held, that this was a clear case of murder. *The State v. Howell*, 9 Ired. 485.

66. In Mississippi, under a statute which provides that "every person who shall be convicted of shooting at another with intent to kill" shall be punished, &c., it is necessary to prove the special intent to kill the particular person named in the indictment; and proof of an intent to kill any other person, or a general malicious intent, will not support the indictment. *Morgan v. The State*, 13 S. & M. 242.

67. Drunkenness is no excuse for crime, and is not admissible as mitigation in a case of murder in the second degree, although it seems that evidence of drunkenness would be admissible to show that the prisoner was incapable of the premeditation which is necessary to constitute murder in the first degree. *Pirtle v. The State*, 9 Humph. 663.

68. Where a party, without necessity, kills another with a deadly weapon, the law, in the absence of proof to show that it was accidental, will imply that the act was voluntarily done. *Oliver v. The State*, 17 Ala. 587.

69. If an act amounting to manslaughter be voluntarily committed, the statute, without regard to the circumstances of provocation, fixes the grade of the offence, and pronounces it manslaughter in the first degree. *Id.*

70. Whether the circumstances are such as to create a reasonable belief in the mind of the slayer, that a necessity exists for taking the life of another, is a question for the jury, in the solution of which they may consider the condition of both the parties. *Id.*

71. The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. *Id.*

72. The law will justify the taking of life, when necessary to prevent the commission of a felony, but not to prevent the commission of a mere trespass on the person or property of another. *Id.*

73. The distinction between murder and manslaughter is

not altered by the statute of Arkansas, nor is the nature or definition of murder, both remaining as at common law. *Bivens v. The State*, 6 Eng. 455.

74. Where a man is indicted for malicious homicide, which is not one of the kinds mentioned in the statute, the proof must show that the death was the ultimate result sought by the concurring will, deliberation, malice and premeditation of the party accused. *Ib.*

75. The premeditation to kill must exist before the act of killing, and not be formed by provocation received at the time of the act, nor so recently before as not to afford time for reflection. *Ib.*

76. Killing with a deadly weapon is *prima facie* evidence that the design to kill was formed in the mind of the party committing the act, and that the killing was the consequence of such design. *Ib.*

77. In the trial of a defendant indicted for murder, when the defendant admitted the homicide, but rested his defence on the ground that it was justifiable homicide, it was held to be error in the court to charge the jury that defendant's evidence of good character, as a peaceable man, applied only to cases where it was a question whether the homicide had been committed by the accused. *Davis v. The State*, 10 Geo. 101.

78. Where, on a trial of a defendant for murder, the homicide is admitted, and the question is as to what grade of the offence the defendant is guilty, or whether it is justifiable homicide, it was held to be error in the court to charge the jury "that a reasonable doubt was, when it was doubtful whether a homicide had been committed, and if committed, whether the accused was the slayer." *Ib.*

79. The crime of murder being divided by the penal code into two grades, with different punishments, it is necessary, on the conviction of the prisoner for that offence, that the verdict of the jury should ascertain the degree, otherwise no judgment can be pronounced upon it. That the murder was committed by means of poison, can make no difference. *Johnson v. The State*, 17 Ala. 618.

80. On the trial of the prisoner for the murder of his wife, proof that the prisoner, during the year preceding the homi-

cide, applied to the mother of a single woman for permission to visit her daughter, and was denied it because he was a married man, is admissible to show a motive for the commission of the crime. *Id.*

81. And proof that the wife, for some time prior to her death, had been compelled by the prisoner to sleep in his kitchen, which was very open, and stood apart from the dwelling-house in which he and the children lived, is admissible to show both malice and motive. *Id.*

82. Upon a trial for murder, proof that the deceased, pending the quarrel, but before the fight between the prisoner and deceased, charged the prisoner with having been "for some time mad at him," stating facts to sustain the charge, but which charge the prisoner then denied, is admissible to show the circumstances under which the scuffle was brought about, but it is no evidence of the truthfulness of the charge, or of the statements made to sustain it. *Haile v. The State*, 1 Swan, (Tenn.) 248.

83. "That the killing will be manslaughter, if the reason of the prisoner was temporarily dethroned by passion," is a figure of speech which ought not to be used by a judge in his charge to the jury, on a trial for murder, as they may infer therefrom that no sudden heat, short of the dethronement of reason, will mitigate a killing to manslaughter. hence it is error so to charge. *Id.*

84. A charge, "that although, in general, mere words might not be sufficient provocation to reduce the crime of murder to manslaughter, yet the jury were the judges whether the provocation, if more than by mere words, was sufficient," should be refused, as calculated to mislead the jury, because it leaves them to infer that mere words may, in some cases, thus reduce the offence; because it assumes that it is not the province of the court, but of the jury, to pass upon the legal sufficiency of the provocation; and because, there being uncontradicted evidence of express malice, no degree of provocation could extenuate the offence, and the charge, in that view of the case, was inapplicable to the fact. *Felix v. The State*, 18 Ala. 720.

85. In an indictment for murder, the designation of the

person slain as a free negro, though unnecessary, is matter of description, and must be proved as alleged; and proof that he was a mulatto will not sustain the allegation. *Id.*

86. On the trial of an indictment for murder, the defendant cannot prove threats made by the deceased against him, without also proving that such threats came to his knowledge before the killing. *Powell v. The State*, 19 Ala. 577.

87. It is not competent for a prisoner, indicted for murder, to give in evidence his own account of the transaction, related immediately after it occurred, though no person was present when the homicide was committed. *Bland v. The State*, 2 Carter, (Ind.) 608.

88. The degree of force, or the means to be employed in protecting one's person or personal liberty, must depend on circumstances. To justify a person in taking the life of another, it must appear that his safety required him to do so. *The People v. Doe*, 1 Manning, (Mich.) 451.

89. It is incumbent on the government to prove, beyond reasonable doubt, the truth of every fact in the indictment, necessary, in point of law, to constitute this offence. These facts need not be proved beyond all possible doubt, but a moral conviction must be produced in the minds of the jurors, so as to enable them to say that they verily believe their truth. It is essential to the crime of murder, that the killing shall be, from what the law denominates malice aforethought, and the government must prove this allegation; but it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill. *United States v. McGlue*, 1 Curtis, 2.

90. Where several persons are jointly indicted, one of them is not a competent witness for or against the others, without being first acquitted or convicted; and it makes no difference whether the defendants plead jointly or separately. An accomplice separately indicted is competent. *The People v. Donnelly*, 2 Parker's Cr. 182.

91. On a trial of an indictment in the Court of Sessions, the county judge presiding at the trial cannot be sworn and examined as a witness; he cannot, at the same time, act in

the capacity of both judge and witness. *The People v. Miller*, 2 Parker's Cr. 179.

92. On a trial for murder, it is competent for the public prosecutor to prove what the defendant testified to before a coroner's jury, at an inquest held on the body of the deceased, though it appears that the defendant, with other persons, were, at the time, under arrest for the alleged murder, the inquiry on such inquest not having been as to the guilt of the defendant, but being general, to ascertain, if possible, who was the murderer. *The People v. Thayers*, Parker's Cr. 595.

93. Where, on trial for murder by poisoning, the deceased, on the third day of her illness, said to her female attendant, that she expected to die because she was poisoned, and also expressed a similar opinion at a subsequent time, and at no time expressed an opinion that she should recover, her declarations made after the third day of her illness, down to the time of her death, on the twelfth day of her illness, were received as evidence, although it did not appear that either of her attending physicians had told her she was going to die, and although it appeared that one of the physicians, notwithstanding the cause of her illness, had spoken to her encouragingly of her prospects of recovery. *The People v. Grunzig*, Parker's Cr. 299.

94. To entitle the prosecution, on a trial for murder, to introduce evidence of the dying declarations of the deceased, it must appear, by the preliminary evidence, that the declarant knew or believed his injury was mortal, and that death was rapidly approaching. This may be shown by the expressions and conduct of the deceased, or by other satisfactory evidence. *The People v. Knickerbocker*, Parker's Cr. 302.

95. Though the party calling the witness prove the fact that there was a subsequent conversation, that does not entitle the party cross-examining the witness to prove what was said at such subsequent conversation. *The People v. Green*, Parker's Cr. 11.

96. What facts must be established to convict on the trial of an indictment for murder—the distinction between positive and circumstantial evidence, and the comparative reli-

ability of each—the reasons for proving, and the character and value of dying declarations—the question of motive—and the cases in which the accused may avail himself of a previous good character—stated and discussed in the charge. *Ib.*

97. After the introduction of the proper preliminary evidence, the prosecution is entitled to show such dying declarations, notwithstanding there may be other witnesses by whose testimony the same facts might be proved, which are sought to be established by such dying declarations. *The People v. Knickerbocker*, Parker's Cr. 302.

98. On a trial for murder, it appeared that the father of the defendants had been arrested and examined before a magistrate, on a complaint against him for the same murder; and that on such examination, one of the defendants, who was also at the same time under arrest for the murder, came forward as a volunteer witness, and testified on such examination. Held, that his statements, made under oath, on such examination, were admissible in evidence against him. *The People v. Thayers*, Parker's Cr. 595.

99. Where a juror, on being called, is challenged on the ground of having formed or expressed an opinion as to the guilt of the prisoner, such juror may be examined as a witness, for the purpose of sustaining a challenge. *The People v. Christie*, 2 Parker's Cr. 579.

100. A juror, when examined as a witness, for the purpose of sustaining a challenge to the favor, will not be excused from answering whether he has any prejudice or bias against a religious sect, on the ground that such answer would disgrace him. *Ib.*

101. Where, on the trial of several defendants on an indictment for a riot, it appeared that a secret society so organized for the purpose of repressing the class or sect to which the defendants belonged, it was held to be competent to require a witness who had been called, and had testified on the part of the prosecution, to answer, on a cross-examination, whether he was a member of such secret society. *Ib.*

102. Where it appeared that a third person had drank with the deceased at the same time he was supposed to have

been poisoned, of the same beverage, and administered by the same person, and had died soon afterwards, the court permitted evidence to be given, that arsenic was found in the stomach of such person, and that she died from the effects of that poison. *The People v. Robinson*, 2 Parker's Cr. 235.

103. On a motion to admit to bail, on an indictment for murder, upon the testimony taken before the coroner, and before the grand jury, the defendants will not be permitted to furnish further proof, either by affidavits or oral testimony, tending to establish their innocence. *The People v. Hyler*, 2 Parker's Cr. 570.

104. It is not necessary to prove express malice or ill-will against the person killed; thus, when children were drowned to prevent their coming to want, it was held that the law would imply malice from the illegality of the act. *The People v. Kirby*, 2 Parker's Cr. 28.

105. On the trial on an indictment for murder, a witness, called in behalf of the prisoner, testified on the cross-examination, that the prisoner became attached to a lady while she was staying at the house of his father, and that she became pregnant at that time and during her stay there, and it was held incompetent for the prosecution to prove further by the witness, that the witness knew the prisoner was charged with the seduction, and that the witness heard of it within a few days after the young lady left; and where such evidence had been admitted at the Oyer and Terminer, a new trial was granted. *The People v. Thurston*, 2 Parker's Cr. 49.

106. Where a person, charged to have been murdered by poison, expressed during his last illness his opinion that he should not live, but was encouraged by his attending physician to believe that he would recover, his statements made immediately thereafter were held not to be admissible as dying declarations. *The People v. Robinson*, 2 Parker's Cr. 235.

107. Very soon after the drinking of the supposed poison, the deceased was asked how he felt "after that glass of beer," held, that his answer, "he did not feel comfortable,"

was competent evidence, though made in the absence of the prisoner. *Ib.*

108. On the trial of an indictment for murder, committed immediately after an assault by the deceased upon the defendant, evinces that the general character and habits of the deceased were those of a quarrelsome, fighting man, of great strength, is inadmissible to prove the provocation and apprehension of bodily harm under which the defendant acted. *Commonwealth v. Hilliard*, 2 Gray, 294.

109. On the trial of a party for the murder of his wife, where it appeared that the prisoner was examined as a witness before the coroner's inquest, and that he had been previously arrested for the murder by a constable, without warrant, and was under arrest at the time of his examination as a witness, though the fact of his arrest was not known to the coroner, but was a separate and independent proceeding, it was held competent to prove what the prisoner testified to before the coroner's jury. *The People v. McMahon*, 2 Parker's Cr. 663.

110. Evidence given under such circumstances will be deemed voluntary, because the witness has the right to refuse to answer any question tending to criminate himself. *Ib.*

111. On a trial for murder, there being evidence that the prisoner shot the deceased as he was coming up the street towards the prisoner's office, it was held, that the prisoner's declaration to the witness, "Yonder comes Macon" (the deceased) "with his yauger," (a kind of gun,) before firing, was admissible, as part of the *res gestæ*; but not the statement which followed, "He intends to shoot or kill me." Held, also, that a statement of the prisoner to a witness, before the shooting, that he saw the conduct of the deceased that morning, which conduct was testified to by the witness as being violent and threatening, as he passed with his gun, was admissible, as showing the prisoner's ground for alarm. *Monroe v. State*, 5 Geo. 85.

112. Evidence of threats by the deceased, accompanied with occasional acts of personal violence, is admissible to justify the reasonableness of the defendant's fears, provided

a knowledge of the threats is brought home to him. And repeated quarrels may be shown between the parties, to establish the *malo animo*; but the evidence cannot be allowed to go back to a remote period, and prove a particular quarrel or cause of grudge, unless it be followed up with proof of a continued difference flowing from that same source. *Id.*

113. The defendant cannot prove the character of the deceased for violence, where the killing took place under circumstances that showed he did not believe himself in danger; yet, in a case of doubt whether the homicide was perpetrated in malice or from a principle of self-preservation, it is right to admit any testimony of this kind, as it tends to illustrate to the jury the motive by which the defendant was influenced. *Id.*

114. Evidence that, as a justice of the peace, the prisoner had prosecuted the deceased for embezzlement of the county school-fund, and that, in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him, is admissible, in connection with other circumstances, to show that the defendant was in fear of his life from the deceased, and that the killing was in self-defence. *Id.*

115. An act performed by a quick, impulsive, bloodthirsty, abandoned man may afford much stronger evidence that the life of the person assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation. In such case, the act and the *status* of the actor must be taken together, in order to arrive at a just conclusion respecting its nature; and thus the character of the deceased may become a legitimate subject of inquiry, as connecting itself with the transaction which it may serve to explain. *Pritchett v. The State*, 22 Ala. 39.

116. When a homicide is committed under such circumstances as tend to show that the slayer acted in self-defence, the previous threats of the deceased, and his conduct on the fatal occasion, construed with reference to his known character and peculiarities, having relation to such conduct and tending

to explain it, all enter into and form parts of the transaction, and may properly be received in evidence. *Ib.*

117. In a case of homicide, malice was inferred from all the circumstances of the killing. The prisoner then put in evidence to some extent rebutting this presumption. Held, that the state could then prove express malice. *Bird v. The State*, 14 Geo. 43.

118. On the trial of an indictment for murder, the question before the jury was the identity of the prisoner with the murderer. The state offered in evidence the registers of three several hotels, each in a different city, accompanied by parol proof that the three names were written by the prisoner, and that he was known by those names respectively in the three cities; and they were admitted without objection. Held, that in considering the question whether the three names were written by the same person, the jury might compare the handwritings in the several registers. *Crist v. The State*, 21 Ala. 137.

119. Evidence that the shoes taken from the feet of the horse ridden by the prisoner on the morning of the murder, "seemed to fit in every particular" the tracks found near the remains of the deceased, is admissible against him. *Campbell v. The State*, 23 Ala. 44.

120. After the state has proved the appearance of the prisoner on the evening of the day of the murder, and on the following day, the prisoner will not be allowed to prove that, on the third day after, on being informed of the murder, he appeared surprised, nor will he be allowed to show that he appeared astonished on being told that he was suspected of the murder. *Ib.*

121. A. and B. were together, when the defendants came up and attacked A., who, after firing his pistol at one of them, fled. They pursued him a short distance, and immediately returned to where B. was, whom, as was inferred from circumstances, they killed, and were indicted for his murder. Held, that it was competent on the trial for the state to show the attack on A. as immediately connected with the killing of B., and constituting part of the same transaction. *Clorg v. The State*, 8 Eng. (13 Ark.) 236.

122. In a trial for murder in the second degree, the state may prove previous threats made by the defendant against the person he afterwards killed, in order to show that the killing was malicious. *Stewart v. The State*, 1 Ohio, 66.

123. In almost every case, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of wood or of metal, whether the blows were repeated, and whether they were sufficient to cause death. If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand or at a distance; whether the aim would appear to have been deliberately taken, and whether the position of the deceased and the location and direction of the wound are such as to sufficiently indicate the premeditation of the act. *Dean's Med. Juris.* vol. i. 242.

124. It is important to inquire, in cases where the defence of suicide may be started, whether there are marks upon the person other than those made by the fatal wound, *e. g.*, whether the hands or arms have the appearance of having been held forcibly during the commission of the deed; whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame; whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound. It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, where on the floor the presence of another person in that room was clearly demonstrated by the print of a bloody left hand on the left arm of the deceased. *Case of Mary Norkot and others*, 14 Ho. St. Tr. 1,324.

125. Where the deceased was shot in the street, when looking at a parade, and where the question was, whether he was killed by a stray shot or by a gun, which there was some evidence to show was aimed from a third-story window,

the doubt was solved by the slanting direction of the wound. Taylor's Med. Juris. 330.

126. When the death was produced by a dirk knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning the handle of a knife, with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards, upon a *post mortem* examination of the deceased, the blade of a knife was found broken in his heart. Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused, but there was no evidence to the identity of the blade. The question remained, therefore, whether the blade belonged to the handle, and when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other that no person could doubt that they had belonged together, because, from the known quality of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match. *Bemis Webster's Case*, 466.

127. A young man in France was found dead in his bed, with three wounds in the front of his neck. The physician who was first called to see him had unknowingly stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence of this was that suspicion was raised against a party, who narrowly escaped being committed to take his trial for murder. It subsequently turned out to be a clear case of suicide. Taylor's Med. Juris. vol. i. 372.

128. "When blood exists, in large quantities, upon furniture, clothing, &c., a general inspection, with the aid of chemistry, will determine its presence with sufficient accuracy. It is, however, not unfrequently found in too small quantities for chemical analysis; and it has happened that the statement of a police officer, or other non-professional spectator, has been admitted as evidence that the stains in question were those of blood, when the bare announcement by the physician, even, should be taken with the greatest caution. There are abundant instances in the treatises on medical jurisprudence of unfounded charges and unjustifiable arrests

having been made in consequence of an error at the outset, as to the true nature of stains assumed to be blood. It is, therefore, in the highest degree important that examinations should be conducted with the greatest care, and that another sign than color (which has been abundantly proved to be fallacious) should be obtained. Recently drawn blood, when placed under the microscope, is at once recognised by the presence of a vast number of flattened discs (commonly, though inaccurately, designated as 'blood globules') of a red color, with a single centre spot, interspersed among which may be seen, in far less numbers, compared with the discs themselves, rounded, colorless globules, containing each three or four central granules. These last are known to physiologists, as 'lymph corpuscles,' or 'lymph globules,' proper. If a drop of blood be dried on a piece of glass, painted wood or other surface, and a small portion (a thin scale, scraped off with a knife, is the most desirable form) be placed under the microscope, and water added to it, it soon becomes softened, very slightly tinges the water around it with a pale reddish color, and becomes more or less transparent, according to its thickness. After a careful inspection, the observer will seldom be able to find any traces of blood-discs, but transparent, colorless spots will be seen scattered through the mass, which, with a high power, (say 800 diameters,) may be seen to have a globular form, and to contain granules—usually three or four. These are the lymph corpuscles. If a drop of blood be rubbed on a piece of glass, as by drawing a bloody finger across it, so that the discs are deposited in a single layer, and then allowed to dry, they are readily recognised even in a dry state; but when allowed to dry in masses I have failed to determine their presence. The lymph globules, on the contrary, may be softened out after they have been dried for months, and their characteristic marks readily obtained. I have examined blood which has been dried for six months, and have found it easy to detect them. It is not improbable that they may be detected after the lapse of years, if the blood shall have been preserved dry, so as to prevent decomposition. The evidence that the stains on the pantaloons and slippers of Professor Webster were of blood, was derived

wholly from the microscope. And the presence of the lymph corpuscles, combined with the color and other and less characteristic microscopic appearances of the blood, was the basis of the opinion given on the trial. While the presence of lymph corpuscles, combined with the ordinary and more obvious appearances of blood, is regarded as the diagnostic sign of blood, yet it should never be lost sight of that it does not give an absolute sign that the blood is never of the human body. The blood of some animals so closely resembles that of man, in its microscopic characters, that, as yet, no positive means exist by which they may be distinguished. The opinion that a stain of blood in question is human or animal, must rest upon improbabilities." Statement by Professor Wyman, reported in Bemis' *Webster's Case*, 90 and 91, n.

129. Where it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him, that they met in the street on a star-light night, when they could see each other, that the deceased pressed for a fight, but the prisoner retreated a short distance, that when the deceased overtook him, the prisoner stabbed him with some sharp instrument which caused his death, and at the time of this meeting the deceased had no deadly weapon; it was held, that in such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the rencontre, that the killing was in self-defence, the presumption being that the killing was malicious. *State v. Scott*, 4 Ired. 409.

130. When if reasonable doubt arises as to the malice, the court would properly instruct the jury to find manslaughter, as where a mother exposed her infant child in a garden, and it was devoured by a kite, or where the death of a pauper was produced by constant shifting, on the part of the overseers of the poor, from parish to parish. *Com. v. York*, 9 Met. 93.

131. By the common law, independent of all local legislation, it is not only murder for one man to kill another in a duel, but his second, also, is guilty of murder; and it has been doubted whether this does not extend even to the second

of him who was killed, because the death happened upon a compact in which all were engaged. 1 Hale, 441, 453; *Smith v. Smith*, 1 *Yerg.* 228.

132. Manslaughter is principally distinguishable from murder in this, that though the act which occasioned the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either expressed or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature. 1 East P. C. 218.

133. If there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures, as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only. *R. v. Sherwood*, 1 C. & K. 556.

134. As an evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of express malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 Russ. by Grea. 585.

135. To reduce the homicide to manslaughter in these cases, it must appear that no undue advantage was sought or gained on either side. Foster, 295.

136. The lapse of time between the origin and the quarrel is also to be greatly considered, as it may tend to prove malice. *Lynch's Case*, 3 C. & P. 324.

137. The evidence against a prisoner charged with manslaughter was an admission on his part that unfortunately he was the man who shot the deceased, and the fact that on their coming together, apparently not in ill-humor, from the South Metropolitan Cemetery, where the prisoner was a watchman, but with which the deceased had no connection, the prisoner said to the deceased, "Now you mind, don't let me see you on my premises any more." At the time this

was said, the wound had been given of which the deceased eventually died. Held that, in point of law, the evidence was sufficient to sustain the charge. *Morrison's Case*, 8 C. & P. 22.

138. The prisoner was indicted for manslaughter. The deceased had entered the prisoner's house in his absence, and on his return was desired to withdraw, but refused to go. Upon this words arose, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused an injury which produced death. ALDERSON, B., said "a kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter." *Wild's Case*, 2 Lew. C. C. 214.

139. Where a person practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence or criminal inattention in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter. *Ann v. The State*, 11 Humph. 159.

140. The *corpus delicti*, that a murder had been committed by some one, is essentially necessary to be proved, and Lord HALE advises that in no case should a prisoner be convicted where the dead body has not been found—where the fact of murder depends upon the fact of disappearance. *Tyner v. The State*, 5 Humph. 383.

141. When death is caused by a wound received, the person who inflicts it is responsible for its consequences, though the deceased might have recovered by the exercise of more care and prudence. *McCallister v. The State*, 17 Ala. 434.

142. Where a prisoner was charged with the murder of her new-born child by cutting off its head, held, that in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state, and that the fact of its having breathed was not a decisive proof that it was born alive, as it might have breathed, and yet died before birth. *Elizabeth Sellis' Case*, 7 C. & P. 850.

143. Where an indictment charged that the prisoner, be-

ing big with child, did bring forth the child alive, and afterwards strangled it, PARKE, B., held, that in order to convict upon an indictment so framed, the jury must be satisfied that the whole body of the child had come forth from the body of the mother, when the ligature was applied. The learned baron added, that if the jury should be of opinion that the child was strangled intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced, he should direct them to convict the prisoner and reserve the point, his impression being that it would be murder if those were the facts of the case. The prisoner was acquitted. *Crutchley's Case*, 7 C. & P. 814.

144. Where the indictment charged the prisoner with the murder of "a female bastard child," it was held, that proof of its being illegitimate lay upon the prosecutor, but the evidence of the prisoner having told a person that she had only told of her being with child to the father of it, who had lately got married, was sufficient evidence to support the allegation. *Poulton's Case*, 5 C. & P. 329.

145. In a case of manslaughter it was proved that the deceased was at an inn for three days, and that the innkeeper asked him what his name was, and that while there letters arrived at the inn directed in that name, which letters were delivered to the deceased and received by him. Held, that the innkeeper might be asked what name the deceased gave. *Timmin's Case*, 7 C. & P. 499.

146. On a trial for murder, where the case against the prisoner was made up entirely of circumstances, ALDERSON, B., told the jury, that before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they also must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty party." *Hodge's Case*, 2 Lew. C. C. 227.

147. Where the indictment charged that the prisoner, "with both her hands about the neck of one M. D., suffocated and strangled," &c., and it was doubtful whether the murder was not committed in the prisoner's presence by third per-

sons, PARKE, J., in summing up, said, "If you are satisfied that this child came to her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands, for if it was done by any other person, in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment. *Culkin's Case*, 5 C. & P. 121.

148. If one throw a bludgeon to another, with intent to furnish that other with a deadly weapon to assault, and the assault is made and murder committed, he who threw the bludgeon with such intent is equally guilty with him who struck the blow. *Commonwealth v. Drew et al.*, 4 Mass. 391.

149. Where the prisoner was charged "that with both her hands the neck and throat of the said M. D. she did feloniously, &c., grasp, squeeze and press, and by the grasping, &c., did suffocate and strangle," and it appeared that the death was caused by a hand being held over the mouth of the deceased, it was ruled that the indictment was supported, the death being proved to have been occasioned by suffocation. *Culkin's Case*, 5 C. & P. 121.

150. The second count of indictment charged the death of a child to have been by suffocation, by the prisoner having placed her hand on the mouth of the deceased. Evidence was given that the child had died from suffocation and pressure, and also to show that the deceased must have been killed by the prisoner. It was objected that there was no evidence of any hand being placed on the mouth of the deceased, and there was no charge of death by pressure; but Lord DENMAN, C. J., was of opinion, if the jury should think that any violent means were used to stop respiration, and that the death was thus caused, that the second count was proved. *Ellen Water's Case*, 7 C. & P. 250.

151. The indictment stated that the prisoner, with a certain piece of brick, struck and beat the deceased, thereby giving him, with the piece of brick aforesaid, one mortal wound, &c. It appeared that the prisoner struck, not with the piece of brick, but with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the

brick was the cause of his death. The judges, on a case reserved, were of opinion, unanimously, that the means of death were not truly stated. *Kelly's Case*, 1 Moo. C. B. 113.

152. An indictment for manslaughter, charging that the prisoner "did compel A. B. and C. D., who were working at a certain windlass, to leave the said windlass, and by such compulsion and force, &c., the deceased was killed," is not supported by evidence that the prisoner was working the windlass with A. B. and C. D., and that by his going away they were not strong enough to work it, and let it go. The words "compel and force" must be taken to mean *active* force. *Lloyd's Case*, 1 C. & P. 301.

153. Where it appears that one person's death has been occasioned by the hand of another, it behooves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder. *Greenacre's Case*, 8 C. & P. 35.

154. The greatest possible care is not to be expected, nor is it to be required, but whoever seeks to excuse himself from having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are accustomed to do. The deceased was walking along the road in a state of intoxication. The prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in and the rapid pace of the horses, he could not do so, and was killed. GARROW, B., said, that if a man drive a cart at an unusual rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving, or any other cause, the person cannot get out of the way time enough, but is killed, the driver is guilty of manslaughter. He added, that it is the duty of every man who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. *Walker's Case*, 1 C. & P. 320.

155. What will constitute negligence in the case of driving carriages must depend greatly upon the circumstances of each particular case. It is ruled by Mr. Justice BAYLEY, that a carter, by being in the cart instead of at the horse's head, or by its side, was guilty of negligence, and if death ensued, of manslaughter. *Knight's Case*, 1 Lew. C. C. 168.

156. The prisoner was charged with manslaughter. It appeared that there were two omnibuses which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and was whipping his horses just before his omnibus upset. In summing up to the jury, PATTERSON, J., said, "The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him." *Timmins' Case*, 7 C. & P. 499.

157. To make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there were sufficient light, and the captain of the steamer is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Green's Case*, 7 C. & P. 156.

158. The prisoner was indicted for manslaughter, and it appeared that it was his duty to attend a steam engine, and that on the occasion in question he had stopped the engine and gone away. During his absence, a person came to the spot and put it in motion, and being unskilled, was unable to stop it again, and in consequence of the engine being thus put in motion, the deceased was killed. ALDERSON, B., stopped the case, observing that the death was the consequence not of the act of the prisoner, but of the person who set the engine in motion after the prisoner went away, and that it was necessary, in order to a conviction for manslaughter,

that the negligent act which caused the death should be that of the party charged. *Hilton's Case*, 2 Lew. C. C. 214.

159. Where a person grossly ignorant undertook to deliver a woman, and killed the child in the course of the delivery, it was resolved by the judges that he was rightly convicted of manslaughter. *Senior's Case*, 1 Moody, (C. C.) 346.

160. The rule with regard to the degree of misconduct which will render a person practising medicine criminally answerable is thus laid down by Mr. Justice BAYLEY: "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying, that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." *Long's Case*, 4 C. & P. 440.

161. In a case which occurred before Lord LYNDEHURST, C. B., upon an indictment for manslaughter, (by administering Morrison's pills,) the law on this subject was thus laid down by his lordship: "I agree, that in these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person, totally ignorant of the science of medicine, takes upon himself to administer a violent and dangerous remedy to one laboring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. I shall leave it to the jury to say whether death was occasioned or accelerated by the medicines administered, and if they say it was, then I shall tell them,

secondly, that the prisoner is guilty of manslaughter, if they think, that in so administering the medicines he acted either with a criminal intention or from any gross ignorance. *Webb's Case*, 1 Moo. & Rob. 405; 2 Lew. C. C. 196, S. C.

162. The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. *Oliver v. The State*, 17 Ala. 588.

163. Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that if death ensued, it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath, for instance, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, because the child is exposed on a public road, where persons not only might pass, but were passing at the time, and you will therefore consider whether the prisoner had reasonable ground for believing that the child would be found and preserved. *R. v. Ann Walters*, Carr. & M. 164.

164. The deceased, Mrs. Warner, was about seventy-four years of age, and lived with a sister until the death of the latter, in March, 1837. The prisoner attended the funeral of the sister, and after it was over, stated that the deceased was going to live with him until affairs were settled, and that he would make her happy and comfortable. Other evidence was given, to show that the prisoner had interfered in her affairs, and had undertaken to provide her with food and necessaries as long as she lived. It appeared, that after July no servant was kept, but the deceased was waited upon by the prisoner and his wife. The kitchen in which the deceased lived had a large window, through which persons in the court could see plainly what was passing within, and could converse with the inmates of it. Several witnesses swore, that after the servant left, the deceased remained

locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together, and that on several occasions she complained of being confined, and cried to be let out. They also stated, that in cold weather they were not able to discern any fire in the kitchen; and it appeared that for some time before the deceased's death she was not out of the kitchen at all, but was kept continually locked in there. The prisoner's wife was the only person who was with the deceased about the time of her death, which happened in February, 1838. An undertaker's man, who was called in very soon after, stated, that from the appearance of the body he thought she had died from want and starvation. A medical witness said that there was great emaciation of the body, and the stomach and bowels were empty and collapsed, but that the immediate cause of death was water on the brain, which he seemed to think might be caused by want of food. In summing up to the jury, PATTESON, J., said: "If the prisoner was guilty of willful neglect, so gross and willful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say, whether, from the way in which the prisoner treated her, he had not, by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." After referring to the statements of some of the witnesses, the learned judge continued: "This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, yet, if by his negligence her death was occasioned, then he becomes criminally responsible." The prisoner was found guilty of manslaughter. *Marriott's Case*, 8 C. & P. 425.

165. "To reduce murder to manslaughter," says GIBSON, C. J., "it is necessary that a quarrel should have taken place, and blows have been interchanged between parties, in some measure, upon equal terms of strength and condition for fighting; and this without regard to the question who struck first. Yet this must be taken with some grains of allowance. If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife upon her husband, would bring the killing of her below murder. Under this view of the law I have always doubted *Stedman's Case*, in which, for a woman's blow on the face with an iron patten, given to a soldier in return for words of gross provocation, he gave her a blow with the pommel of his sword on her breast, and then ran after her and stabbed her in the back, and the crime was held to be only manslaughter. Where a blow is cruel or unmanly, the provocation will not excuse it; and the same law exists where there was a previous quarrel, and the killing was on the old grudge." *Com. v. Mosler*, 4 Barr, 268.

166. An unintentional and trivial assault is no palliation. Thus, in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. "In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark, would not authorize such a murderous attack on him." Such an act of itself would be a sure indication of a "depraved and wicked heart, void of all social duty, and fatally bent on mischief." *State v. Tookey*, 2 Rice, 104.

167. A father was informed that a man had wantonly whipped his son, a small boy. On the evening of the next day he met the man, and then he beat and stamped him, with his fist and feet, whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night. It was held, that this was murder, there

being evidence of deliberation. *McWhist's Case*, 3 Gratt. 594.

168. If one seek another and enter into a fight with him with the purpose, under the pretence of fighting, to stab him, if a homicide ensue, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for the malice is express. *State v. Lane*, 4 Ired. 113.

169. "*Prima facie*," says ROLFE, B., "when any man takes away the life of another, the law presumes that he did it with malice aforethought, unless there be evidence to show the contrary. Such are the cases where there has been a quarrel, a fight or dispute, and in the violence of such quarrel, fight or dispute, death has ensued. Undoubtedly we find other cases stated, and among them the case of adultery. It is said, that, if a man were to find his wife in the act of committing adultery, and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you, without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder, and if I were to direct you, or you, were to find otherwise, I am bound to tell you, either I or you would be grievously swerving from our duty. I state that without the least shadow of doubt. We must not shut our eyes to the truth. [His lordship here stated the facts as proved, observing that he thought it very immaterial as to the length of time that elapsed between the time when the prisoner saw the deceased and Dogherty together, and the time when he fired the shot, and equally little material whether the prisoner took the cartridge out of the pouch at the same time when he loaded the musket, or left the room between the one and the other, and concluded.] In point of law there is nothing here to reduce the crime of murder to the crime of manslaughter. The only suggestion is, that the prisoner did it because he had conceived a jealousy of the woman; even if that was so, it would not reduce

the crime to manslaughter. *Regina v. Kelley*, 2 Car. & Kir. 815.

170. Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on sudden occasion, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present, but drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprised of the pursuit by a call from the person holding the prisoner, left the road on which he was walking, and provided himself with a rail from a neighboring fence; that on his return towards the road he met the prisoner, gave back and struck him several blows upon the head as he rushed on, with the rail, which, breaking some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight, and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighboring house, within hearing of the noise of the second quarrel, to reach the place of strife. The court, under this state of facts, were of opinion that both contests could not have constituted one combat, nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means of defence at hand, but was neither equally armed nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the court refused to disturb it. *State v. McCants*, 1 Spear, 384.

171. "Where divers persons," it was said, "resolve generally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in doing so happen to kill a man, they are all guilty of murder, for they must, at their peril, abide the event of their actions, who unlawfully

engage in such bold disturbances of the public peace, in opposition to and in defiance of the justice of the nation. Malice in such a killing is implied by law in all who were engaged in the unlawful enterprise; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary to prevent riotous combinations committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators." "If from the proofs before you," it was said in another case, "it has been made to appear that Hare (the defendant) and others, with whom he was in association after the original assault on the meeting of the 7th of May, and the dispersion of that meeting consequent upon it, left the scene of action, gathered arms and friends, and returned, and there commenced burning the houses and property of the assailants, and firing upon and killing or endeavoring to kill them, not for the purpose of arresting and bringing the original offenders to justice, then their conduct was illegal and unjustifiable, and they each and all are criminally liable for all the consequences flowing from such acts of unauthorized vengeance. The law does not and will not permit any individual or body of men to become their own avenger; and if they attempt it, and injuries to person or property follow, they are criminally responsible for their conduct. If courts of justice should once recognise this wild right of private vengeance, it is evident that the bands of social order and security would be torn asunder, and the cannon and the musket become the substitute for the bench and the jury box, in measuring out the nature and amount of punishment to offenders against public law. The concession of such a right of self-vindication would be the immediate and complete

demolition of all public safety, the surrender of all the powers of government, and the termination of the supremacy of the law. If any citizen or body of citizens are injured or aggrieved, the vindication of their infringed rights belongs exclusively to the civil government; and if they attempt to forestall the public arm and undertake to chastise those from whom they have suffered wrong, they are acting as much in opposition to public justice as the original aggressors. If, during such a scene of unlawful violence, an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in their unlawful doings, such a homicide would be murder at common law in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms, between two bodies of enraged men, should take place in a public street, and, from a simultaneous fire, innocent citizens, their wives or children in their houses, should be killed by some of the missiles discharged. Shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms, in the public highway of a thickly populated city, are they to have the benefit of impracticable niceties, in order to their indemnity from the consequences of their own conduct?" *Com. v. Hare*, 4 Penn. Law Jour. 257.

172. The deceased was requested by his mother to turn the prisoner out of her house, which, after a short struggle,

he effected, and in doing so gave him a kick. On the prisoner leaving the house, he said to the deceased, "he would make him remember it," and instantly went up the street to his own lodging, which was distant from two to three hundred yards, where he was heard to go to his bedroom, and through an adjoining kitchen, to a pantry, and thence to return hastily back again by the same way to the street. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate. He had also three similar knives there, which he used in his trade of a butcher. About five minutes after the prisoner had left the deceased, the latter followed him for the purpose of giving him his hat, which he had left behind him, and they met about ten yards distant from the prisoner's lodgings. They stopped for a short time, and were heard talking together, but without any words of anger, by two persons who went by them, the deceased desiring the prisoner not to come down to his mother's again that night, and the prisoner insisting that he would. After they had walked on together for about fifteen yards in the direction of the mother's house, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument, in two places, giving him a sharp wound on the shoulder and a mortal wound in the belly. As soon as the prisoner had stabbed the deceased a second time, he said he had served him right, and instantly ran back to his lodging, and was heard, as before, to pass hastily through his bedroom and kitchen to the pantry, and thence back to the bedroom, where he went to bed. No knife was found upon him, and the several knives appeared the next morning in their usual places in the pantry. TINDAL, C. J., told the jury that the principal question for their consideration would be, whether the mortal wound was given by the prisoner, while smarting under a provocation so recent and so strong that he might not be considered at the moment the master of his own understanding; in which case the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat,

before the mortal wound was given, in which case the crime would amount to willful murder. That, in determining this question, the most favorable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing of the deceased; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say, whether the prisoner had shown thought, contrivance and design in the mode of possessing himself of his weapon, and again replacing it immediately after the blow was struck, for the exercise of contrivance and design denote rather the presence of your judgment and reason, than of violent and ungovernable passion. The jury found the prisoner guilty of murder. *Hayward's Case*, 6 C. & P. 157.

173. If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things; first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation. *Thomas' Case*, 7 C. & P. 817.

174. A female, called Wagstaffe, was examined, who said, "I saw the prisoner on the Monday before the death of his son. He came to my house drunk, and said he had lost his wife, and that he and his wife had been quarrelling the Saturday night before, and that if his son John came over the door-sill again he would be his butcher. He said his son took his mother's part. I introduced the name of the deceased by saying, that if he beat his wife, his son would take her part, and it was upon that he used the expressions as to the deceased. On the evening before the deceased was killed I saw the prisoner again; he was rather tipsy; I was talking to his wife, who went away when he came up. He said if his wife talked to me he would hit her, and he

added, 'To-morrow is the day of execution, and that day I shall finish their hash.' I told him if he was sober he would not say so; to this he made no reply. I begged him to be quiet, and he went into his own house." In the cross-examination, this witness stated, that the threat, "I will be your butcher," is a common threat in that part of the country. COLERIDGE, J., told the jury, after observing on the declarations of the prisoner spoken to by the last witness, which he did not think entitled to much consideration, "Then I will suppose that all was purely unpremeditated till Chorton came, and then the case will stand thus: the father and son have a quarrel; the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question, (the son having given no further provocation,) whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow that it excused the act that was done, and whether the father was acting under the recent sting, or had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting on its sting, and the blood remained hot; but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because, though the law condescends to human frailty, it will not indulge human ferocity." The prisoner was found guilty of manslaughter. *Kirkham's Case*, 8 C. & P. 115.

175. When a deliberate purpose to kill or do a great bodily harm is entertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that his purpose was abandoned before the act was done. *State v. Johnson*, 1 Ired. 354; *State v. Lane*, 4 Id. 113.

176. The prisoner returning home was overtaken by the prosecutor. They were both intoxicated, and a quarrel en-

suing, the prosecutor struck the prisoner a blow. They fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued and overtook him. On this the prisoner, who had taken out his knife, gave the prosecutor a cut across the abdomen. The prisoner being indicted for cutting the prosecutor with intent to murder him, PARKE, J., left it to the jury whether the prisoner ran back with a malicious intention of getting out his knife, to inflict an injury on the prosecutor, and so gain an advantage in the conflict; for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, he was of opinion that if death had ensued, the crime of the prisoner would have been murder; or whether the prisoner *bona fide* ran away from the prosecutor with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; and in the latter case, if the prosecutor had been killed, it would have been manslaughter only. *Kessal's Case*, 1 C. & P. 437.

177. The lapse of time, also, which has taken place between the origin of the quarrel and the actual contest, is in these cases a subject of great consideration, as in the following instance: The prisoner was indicted for the willful murder of William Harrington. It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public house, on the night of the 27th of February, till about twelve o'clock; that about one they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away. He, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The prisoner's father proved that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellect, but not so much as not to know right from wrong. Lord TENTERDEN, in summing up, said:

“It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went away any where for the knife. The father says that this is the knife he carried about with him; it was a common knife, such as a man in the prisoner’s situation in life might have; for aught that appears, he might have gone a little way from the deceased, and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connections of the deceased and the prisoner with respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about a hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind, (which, under the circumstances, I should think you hardly would,) then you will find him guilty of murder.” The jury found the prisoner guilty of manslaughter. *Lynch’s Case*, 5 C. & P. 324.

178. The prisoner was indicted for the murder of Charles Flower Mirfin, who was killed in a duel by a Mr. Elliott. Neither of the prisoners acted as a second on the occasion, but there was evidence to show that they and two other persons went to the ground in company with Mr. Elliott, and that

they were present when the fatal shot was fired. VAUGHAN, B., told the jury, "When, upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the seconds, also, are equally guilty. The question then is, did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest?" After observing that neither prisoner had acted as a second, the learned judge continued: "If, however, either of them sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do any thing, yet if he were present and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by this indictment." The prisoners were found guilty. *Young's Case*, 8 C. & P. 644.

179. An officer is not justified in killing to prevent an escape, where the party is in custody on a charge of misdemeanor. The prisoner, an excise officer, had apprehended a smuggler, who, after his capture, assaulted the officer and beat him severely, when the officer fired a pistol at his legs, and warned him to keep off. The smuggler, however, rushed forwards, when the prisoner again fired at and killed him. HOLROYD, J., said to the jury, an officer must not kill for an *escape* when the party is in custody for a misdemeanor; but if the prisoner had reasonable grounds for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of using such weapon by the previous violence he had suffered, then he was justified. *Foster's Case*, 1 Lew. C. C. 187.

180. Where a peace officer or other person, having the execution of process, cannot justify without a reliance on such process, it must appear that it is legal. But by this it is only to be understood that the process, whether by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. Though there may have been error

or irregularity in the proceedings previous to the issuing of the process, yet if the sheriff or other minister of justice be killed in the execution of it, it will be murder, for the officer to whom it is directed must, at his peril, pay obedience to it; and, therefore, if a *ca. sa.* or other writ of the kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for the murder, to produce the writ or warrant without showing the judgment or decree. *Roger's Case*, Foster, 312.

181. Where an officer attempts to execute an illegal warrant, and is, in the first instance, resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. *Thompson's Case*, 1 Moody, (C. C.) 80.

182. The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. *State v. Scott*, 4 Ired. 409.

183. If one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder; and, consequently, an assault with intent to kill cannot be justified on the ground that it was necessary to prevent a trespass on property. *State v. Morgan*, 3 Ired. 186.

184. Whether a person who is *assaulted* by another will be justified in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault and the circumstances under which it is committed. It may be of such a character that the party assaulted may reasonably apprehend death, or great violence to his person, as in the following case: Ford being in pos-

session of a room at a tavern, several persons persisted in having it, and turning him out, but he refused to submit, when they drew their swords upon Ford and his company, and Ford, drawing his sword, killed one of them, and it was adjudged justifiable homicide. Both in Kelyng and in Foster, a *quere* is added in this case. But Mr. EAST observes, that though the assailants waited till Ford had drawn his sword, (which by no means appears,) yet if more than one attacked him at the same time, (and as he was the only one of his party who seems to have resisted, such, probably, was the case,) the determination seems to be maintainable. *Ford's Case*, Kel. 51.

185. The prisoner and the brother of the prosecutor were fighting, on which the prosecutor laid hold of the prisoner to prevent him from hurting his brother, and held him down, but did not strike him, and the prisoner stabbed him with a knife above the knee. The prisoner being indicted for stabbing, under the 9 Geo. IV. c. 31, Mr. Justice JAMES PARKE said, the prosecutor states that he was merely restraining the prisoner from beating his brother, which was proper on his part. If you are of opinion that he did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck the prisoner any blows, then I think that it would. You will consider whether any thing was done by the prosecutor more than was necessary, or whether he gave any blows before he was struck. *Bourne's Case*, 5 C. & P. 120.

186. Lieutenant Moir, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a gun at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. He had gone home for a gun, on seeing the trespasser, but no personal contest had ensued. Being indicted for murder, he was found guilty and executed. *Moir's Case*, 1828; *Price's Case*, 7 C. & P. 178.

187. Where a person is set to watch premises in the night, and shoots at and kills another who intrudes upon them, the nature of the defence will depend upon the reasonable grounds which the party had to suspect the intentions of the trespasser. Any person, said GARROW, B., in a state of this kind, set by his master to watch a garden or yard, is not at all justified in shooting at, or injuring in any way, persons who may come into these premises even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened; and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter. *Scully's Case*, 1 C. & P. 319.

188. Where a seaman is in a state of debility, and the master knowingly and maliciously compels him to go aloft, and he falls into the sea and is drowned, it is murder. If there be no malice, it is manslaughter. *United States v. Freeman*, 4 Mason, 505.

189. "The statute," says MARVIN, J., "specifies the cases of justifiable homicide. (2 R. S. 660, § 3.) By the second subdivision of that section, the homicide is justifiable when committed 'in lawful defence of such person, or his or her husband, wife, parent, child, master, mistress or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.' The charge is very nearly in the language of this section. It is argued, however, that if the prisoner did apprehend a design, on the part of Brush, to do him some great personal injury, and believed he was in great danger, he had then a right to act upon that belief, and take the life of Brush, although there was no actual imminent danger. In other words, if he believed in the danger, he had a right to act as though the danger was actually present, and the injury about to be inflicted upon him, and that the conse-

quences of this mistaken belief, must fall upon the deceased, and the prisoner must, in the eye of the law, stand entirely justified. Several particulars are to be noticed in this section, as applicable to the present case. The homicide, if justifiable, must have been committed in the lawful defence of the person of the prisoner, at a time when there was reasonable ground to apprehend a design to do him some great personal injury. Who is to judge of the reasonable ground to apprehend a design to do injury? The grounds must be made to appear on the trial, and the jury must be satisfied that they were reasonable grounds upon which to found an apprehension of a design to commit the felony, or to do some great personal injury. It is true the party assailed must, at the time, judge of the ground for his apprehension, but he judges and decides at his peril, so far as the question of entire justification is concerned. It will not do to hold that he who has taken the life of another is entirely justifiable when he acts upon unreasonable grounds of apprehension, though he may have acted upon an honest apprehension of a design, on the part of the person killed, to commit a felony or to do him some great bodily injury. In such a case the crime might be only manslaughter, and that, too, of the lowest degree. But to justify the act of killing in such a case would be to establish a rule for the security of human life, resting upon the uncertain apprehension of men who may act upon unreasonable and improbable grounds. The statute also adds this further condition: 'And there shall be imminent danger of such design being accomplished.' The language is here changed. The question no longer depends upon reasonable grounds to apprehend imminent danger, from which a belief may be formed.

"It is, to my mind, clear and explicit, and requires that there should be imminent danger of the commission of a felony or of some great personal injury. The man assaulted may have reasonable ground to apprehend a design on the part of his assailant to do him some great personal injury, and yet there may, in fact, be little or no danger of the accomplishment of the design. Suppose the party committing the assault was unarmed, and weak and infirm, as compared

with the party assaulted, and this disparity of strength is such that the party assaulted is able to protect his person from injury. The imminent danger of accomplishing the design would not exist, and yet the design may have been fully formed and manifested in a way so as to leave no doubt of it. In such a case the killing of the assailant could not be justified.

“What is meant in the statute by ‘such design?’ Does this language imply that a design to commit a felony, or to do some great personal injury, had been actually formed? If so, then a reasonable ground to apprehend a design, &c., as declared in the previous part of the section, is not sufficient; but there must be added to it not only the imminent danger, but the actual design. This is not the true construction of the language. If there is a reasonable ground to apprehend the design, and there is imminent danger that such apprehended design will be accomplished, it is sufficient. The party assailed may have reasonable ground to apprehend a design on the part of the assailant to kill him, and he may be in imminent danger, from the acts of the assailant, of being killed, and yet his assailant may not have formed the design to kill him, or to do him great personal injury. His acts may, however, be such as actually to put the life of the person assailed in imminent danger. In such a case the killing would be justifiable. I am satisfied that the legislature considered the common law carefully, and that they adopted it in the section relating to justifiable homicide, and that they have thereby provided that a homicide shall not be justifiable unless there was, first, reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury; and, secondly, there was imminent danger of such apprehended design being accomplished; that is, that there was imminent danger that a felony would in fact be committed, or that some great personal injury would be inflicted, unless the party was arrested by death. If I am right in this construction of the statute, the charge of the learned justice was in strict accordance with the law

“When one, who is without fault himself,” said BRONSON,

J., when the same case was in the Court of Errors, "is attacked by another, in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done." He must decide, at his peril, upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice PARKER, of Massachusetts, on the trial of Thomas O. Selfridge. 'A., in the peaceable pursuit of his affairs, sees B., walking rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A.' Upon this case, the judge inquires, 'will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded; a doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehensions, no danger can be supposed to flow from this principle.' The judge had before instructed the jury, 'that when, from the nature of the attack, there is reasonable ground to believe

that there is a design to destroy life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.' (*Selfridge's Trial*, 160; 1 Russ. on Crimes, 699, ed. of 1824; 485, note, ed. of 1836.) To this doctrine I fully subscribe. A different rule would lay too heavy a burden on poor humanity. I have stated the case of *Selfridge* the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question. I shall not stop to consider the common law distinctions between justifiable and excusable homicide, because our statute has placed killing in self-defence under the head of justifiable homicide. (2 R. S. 660, § 3.) The Massachusetts case lays down no new doctrine. The same principle was acted on in *Levett's Case*, recited by JONES, J., in *Cook's Case*, (Cro. Car. 538,) to the following effect: Levett was in bed with his wife, and asleep, in the night, when the servant ran to them in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down, and was searching the entry for thieves, when his wife, espying some one whom she knew not in the buttery, cried out to her husband in fear, 'here they be that would undo us.' Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting his rapier before him, killed Francis Freeman, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the court held, that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances, which were wholly false, and yet as he had reasonable grounds for believing them true, he was held guiltless. Foster (Crown Law, 299) says of this case: 'Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used. I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man

may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in *Levett's Case*; and most of them have fully approved it. EAST, in his *Pleas of the Crown*, (vol. i. 274, 375,) has done so. HALE (1 P. C. 42, 474) mentions it among cases where ignorance of the fact will excuse from all blame. HAWKINS (1 P. C. 84, Carwood's ed.) says the killing has not the appearance of a fault. RUSSELL (on Crimes, vol. i. 550, ed. of 1836) approves the decision, which he introduces with the remark, that 'important considerations will arise in cases of this kind, (he was speaking of homicide in defence of one's person, habitation or property,) as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no design existed.' ROSCÖE (Cr. Ev. 639) says, 'it is not essential that an actual felony should be about to be committed, in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified. And he then gives *Levett's* as an example.

"The case of Sir William Hawksworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle. (1 Hale's P. C. 40; 1 East P. C. 275; 1 Russ. on Cr. 549.) Other cases are put in the books, where the killing will be justified by the appearances, though they afterwards proved false. A general, to try the courage or vigilance of his sentinel, comes upon the sentinel in the night, in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his general, and not an enemy, will justify the killing. (1 Hale's P. C. 42; 1 East, 275; 1 Russ. 540.) The case mentioned by Lord HALE, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class. (1 Hale's P. C. 40, 476; 1 Russ. 540.) In *Hampton's Case*, (Kelyng, 41,) the defendant killed his wife with a

pistol which he had found in the street, after ascertaining, as he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. FOSTER (Crown Law, 263-4) calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution, the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false, for if he had not tried the pistol, it would have been murder. FOSTER (265) mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge, being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In *Mead's Case*, (1 Lewin's Cr. Cas. 184,) the prisoner had killed with a pistol one of a great number of persons, who came about his house in the night time, singing songs of menace and using violent language. HOLROYD, J., told the jury, that if there was nothing but the song, and no appearance of violence, if they believed there was no reasonable ground of apprehending danger, the killing was murder. And in the *People v. Rector*, (19 Wend. 569,) COWEN, J., said, alarm on the part of the prisoner, on apparent though unreal grounds, was pertinent to the issue. In the *United States v. Wiltberger*, (3 Wash. C. C. 515, 521,) the judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be apparent, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent; meaning, undoubtedly, that it must wear that appearance. *The State v. Wills*, (1 Cox N. J. 424,) is entirely consistent with this doctrine. The Supreme Court of Tennessee has gone still further, and held that one who kills another, believing himself in danger of great bodily

harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearances, for the killing. (*Grainger v. The State*, 5 Yerg. 459.) This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

"We have been referred to two cases where it was said, in substance, that the killing must be necessary; *Reg. v. Smith*, 8 Car. & P. 166, and *Reg. v. Bull*, 9 Id. 22; and other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, either actual or apparent, for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as have been mentioned.

"The unqualified language that the killing must be necessary, has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances as they were presented at the time. I have met with no authority for saying that a homicide which would be justifiable, had appearances proved true, will be criminal when they prove false.

"But it is said that our statute has changed the rule of the common law on this subject; and that there must in fact be danger of great bodily harm, or the killing cannot be justified. We know that such a change was not intended by the revisers, for they said in their notes, that the provision was 'according to the views of most of the writers upon the subject, and the express decisions in Massachusetts and New-Jersey.' Those writers and decisions have already been noticed. As I read the statute, it affirms the rule in common law. The words are, homicide in self-defence is justifiable 'when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.' (2 Revised Statutes, 660, § 3, subd. 2.) The words 'imminent danger,' in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must in fact be an impending evil, which is ready to fall, but only that there

is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design, and apparent danger that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished must be actual, and not merely apparent. Such a construction would make the last part of the clause nullify the first, for if there must be actual danger that the design will be accomplished, there must, of necessity, be an actual design to be accomplished. *Shorter v. The People*, 2 Comst. 197—202, BRONSON, J.

“Upon the trial of this case, the killing being admitted, the defendant contended that the act had been done to save his own life from a furious attack of the deceased. The court, for the purpose of aiding in the discovery of the *character* of the homicide, permitted the defendant to prove the general character and disposition of the deceased, as a quarrelsome, fighting, vindictive and brutal man, of great physical strength, refusing, against the earnest argument of the able counsel of the defendant, evidence of *particular instances* of his *brutality*, in fighting, &c. It was at this time in evidence that the parties had had a violent contest on the day previous to the alleged killing, and that the defendant was then saved from very considerable injury, and perhaps death, only by the interference of a third person. Judge CONYNGHAM, P. J., a jurist, whose legal ability and high moral tone entitle his opinions to the highest weight, charged the jury at great length, explaining the several degrees of homicide, of which, under the indictment, the defendant could be convicted, and the legal distinction between the several offences. He told them that the killing being admitted, the act could not be *justified*, but that the defendant could be acquitted if the jury believed the taking of the life was *excusable*, under the principles of law to be laid down to them. Upon this point of the case, he said: “When an assault is made upon another with a manifest intent to take life or to do great bodily harm, and the party assailed has *no means* of escape, either from the

situation in which he is placed or the sudden violence of the attack, he may take the life of the assailant to save his own.' In the words of the judge, in *People v. McLeod*, (cited in Whar. C. L. 260,) 'a force which the defendant has a right to resist must of itself be within striking (or I should say, also, *attacking*) distance; it must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance he opposes.'

As a general rule, before a man can resort to the life-taking remedy, he must, as the old books say, flee to the wall, or till he meet with some unreasonable hindrance or impediment which prevents his further retreat; in his own house, however, a man is not bound to abandon his premises to the mercy of an assailant. In the present case, if there was an attack of the deceased, violent, menacing and accompanied by acts or declarations showing a deadly intent, as contended by the defendant's counsel, the law would not require that the assailed party, in his own room, with no mode of backward egress or escape, should retire a step or two merely to the wall of this small room, if by this there could not only be no prospect of escaping an attack likely to take life or do serious bodily harm, but the step would probably expose the party the more to the danger of the assailant. The jury will remember that it is *necessity* which can alone excuse the homicide, and this can only be ascertained by the consideration of all the circumstances of the case as shown in the evidence; a light and trivial assault, not attended by menaces of personal violence, calculated to induce a reasonable belief of the danger of death or common bodily injury, will not excuse the taking of life, though it may reduce the offence to manslaughter. Provocation, by mere words, not accompanied by *acts, making or menacing* an immediate assault, as has been already said, will not, when death is produced by the use of a deadly weapon, as in the present case, lessen the offence to manslaughter, nor will it do so in any case, where the provocation is only used to cover pre-existing malice and grudges.

"The judge then referred to the evidence in detail, and afterwards again stated as follows: 'When you ascertain from

the evidence the manner of the admitted killing, if you find it to have been done in defence of an attack by the deceased, in deciding upon the character of the offence, you are called upon to examine and revise every thing which goes to explain the true situation of the parties at the time; their respective feelings and intentions, shown by their acts, their threats and menaces, as may be proven; and you may consider, too, their relative characters as individuals, including their strength and physical ability. You may inquire, too, whether the deceased, making, as is contended, the first assault, was bold, strong and of a violent and vindictive character, and the defendant much weaker and of a timid disposition, and how far their power was equalized by the weapon in the hands of the latter. Legal rules are general, but in their application they must at times depend upon the special circumstances of particular cases. In the assault of a strong man upon a boy or a female, of a powerful individual upon a weaker, the necessity of taking life in self-defence under an ordinary attack will be more easily discoverable than in an attack by one man upon another under more equal circumstances; the probable ability to defend without the fatal recourses, must depend upon the means and power of defence in the assulted.

“Moral power, too, is important in sustaining physical power. Timidity of disposition will never excuse rashness, and will not justify the creation or sustaining of imaginary fears, so as to excuse the taking of the life of another, but we say now, as we had occasion to say in this court some years since, upon the trial of Joseph Davis, that the jury may, in deciding upon the degree or kind of homicide, the nature of the attack and the necessity of the defence, consider this ingredient in the character of the slayer as an adjunct to his proper physical power, or rather weakness.

“You are to look at the parties in this unhappy transaction in their relative knowledge of each other’s character and strength, to consider the circumstances attendant upon the contest of Saturday, their respective feelings and all the other circumstances, as already called to your notice; to inquire whether the defendant, as the evidence shows him to

be, the man that *he is* and *was*, not as one of greater courage and strength may be, but as *he was*, when he did the act, had clear reason to believe, that in case of an attack upon him by the deceased, the *man* that the evidence shows him to have been, he would be in danger of loss of life or common bodily harm; and if you do so find, and further, that an attack, apparently of such intent and character, was made upon him, in a room described as this has been, with no other means of escaping the contest, as contended by the defendant's counsel, under the evidence, but by taking the life of the assailant, he would be excused in so doing, even though *this*, to him reasonable belief of the horrible result of such a contest, should be produced partially by the constitutional timidity of his own character, doubly excited by the comparative weakness of his own bodily ability, proved in the contest with the assailant of the day previous. Look you into the heart of the defendant at the time of the transaction, search out his motives, as his acts and declarations show them, and say whether he, constituted as nature made him, and with all his means of defence, had reason to believe, and did believe, that he was in the serious danger above spoken of.

"We further say to you, that if under all the circumstances attending the transaction, there was no reason to believe that his person was in danger of death or common bodily harm, but that an ordinary battery was all that he had any reason to fear from the acts and declarations of the deceased, or that he had shot rashly and prematurely, when the mere presentation of his pistol, as argued here upon the part of the commonwealth, would have been fully sufficient to defend him from the attack, the provocation, connected even with the facts of the Saturday difficulty, would not free the defendant from crime in the eye of the law, but would reduce the offence to manslaughter.

"If, however, he shot the deceased under the influence of revengeful feelings and the grudge of the day before's quarrel, or without any new attack, or the danger heretofore referred to, standing either within or without the room, it would be murder, as we have already explained to you."

Inns and Licensed Houses.

1. Proceedings to revoke the license of an inn-holder, under the Revised Statutes of Maine, (c. 36, § 15,) must be founded on a complaint made to the licensing board, and it is not sufficient to authorize the board to issue a warrant, that matter of complaint has come to their knowledge. *State v. Lamos*, 26 Maine, (13 Shep. 258.)

2. And although such complaint need not be in writing to authorize the issuing of the warrant, yet, before notice to the party accused can be given, the complaint should be reduced to writing, and the matter complained of specifically alleged, that he may know what he is required to answer. *Ib.*

3. The respondent had a license to sell intoxicating liquors at his stand on the corner of A. and B. streets. He had another stand adjoining this, there being an internal communication between the two, and he sold liquors in both. Held, that his license only applied to the place first named. *The State v. Fredericks*, 16 Mis. (1 Bennett,) 382.

4. An indictment for a violation of the statute against the presuming to be "a seller of wine, brandy, rum or other spirituous liquors," &c., without being licensed as an inn-holder, (Revised Statutes of Michigan, 1838, 203, § 1,) charged the defendant with presuming to be a seller of whiskey, alleging it to be spirituous liquor, without such license. Held sufficient; and that the presuming to be a seller of whiskey was forbidden by the statute, although that kind of spirituous liquor was not therein specifically mentioned. *People v. Webster*, 2 Doug. 92.

5. Where the indictment charged that the defendant "became a dealer in intoxicating liquors without having a license therefor in force, and did sell and furnish intoxicating liquors in a less quantity than twenty gallons," &c., it was held, that the indictment was good, and that the averments, beyond what is contained in the prescribed form, may, if necessary, be regarded as surplusage. *The State v. Woodward*, 25 Vt. (2 Deane,) 616.

6. Upon the trial of an indictment, on the Revised Statutes of Massachusetts, c. 47, § 3, for presuming to be a retailer or

seller of spirituous liquor in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and which charges the defendant with selling, to a person named, one gallon, one quart, or any other specific quantity of such liquor, it is not necessary, in order to convict the defendant, that it should be proved that he sold the specific quantity mentioned in the indictment; it is sufficient if it be proved that the defendant made the sale mentioned in the indictment, and that the quantity so sold was less than twenty-eight gallons. *Commonwealth v. Buck*, 12 Met. 524.

7. The act incorporating the village of Clintonville, (New York Statutes, 1845, 172,) authorized the trustees to make such by-laws as they should deem proper, relative to "the regulating, restraining and suppressing of all manner of shops and places for the sale of ardent spirits by retail," and to impose a fine of not more than fifteen dollars for the violation of such by-laws; and this power was, by a subsequent act, declared to be "exclusive" of the powers of the town officers of the town in which the village was situated. Held, that the trustees might make a valid by-law imposing a fine of fifteen dollars for selling ardent spirits in a quantity less than five gallons without having a license from the trustees of the village; that they might prohibit altogether the selling of spirituous liquors, even by persons having a license from the town authorities; and that, after the passing of the by-law first mentioned, a retailer of spirits must have a license both from the town authorities and the trustees of the village. *Trustees of Clintonville v. Keating*, 4 Denio, 341.

8. As the exception of the sale of liquor for medicinal and pharmaceutical purposes, in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offence, and makes a part of the description of it, an indictment under this section is defective without the negative averment. *Hirn v. The State*, 1 Ohio, 15.

9. An indictment charged that the respondent, not having a license, sold five quarts of spirituous liquors to one J. Held, that the state was not bound to prove that the respondent

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had not a license. *The State v. Foster*, 3 Foster, (N. H.) 348.

10. In an indictment for selling liquor without license, the name of the person to whom sold, and the price, are immaterial, as the offence does not violate an individual right. *The State v. Ladd*, 15 Mis. 430.

11. On trial, upon an indictment for selling liquor without license, which charges the sale to have been made to persons to the jurors unknown, proof that the persons were known to the jury constitutes no variance. *Id.*

12. To authorize a conviction on a penal statute for selling liquor, it must clearly appear that the ordinance was in force before the commission of the offence. *Newland v. Aurora*, 14 Ill. 364.

13. Where A. obtained a license to keep a tavern, and B. agreed to pay for the license, and sold liquors in an adjoining room, which he rented from a third person, not being at all under the control of A., it was held, that B. was not protected by A.'s license, but was liable for keeping a tippling-house. *Commonwealth v. Branamon*, 8 B. Mon. 374.

14. The offence of selling spirituous liquors, in violation of the excise laws, may be established by circumstantial evidence. And the fact that the defendant kept liquor in his grocery store to sell, is competent evidence for that purpose, in an action against him to recover the penalty. *Valance v. Everts*, 3 Barb. Sup. Ct. 553.

15. An indictment charging that defendant "did unlawfully sell one-half pint of brandy, of the value of ten cents, to one A., and suffered the same to be drank at the place of sale, without then having a grocer's license, dram-shop keeper's license, an innkeeper's license, or any legal authority to sell," &c., is good; the negation as to license being sufficiently broad. *The State v. Hornbeak*, 15 Mis. 478.

16. On an indictment for selling liquor without a license, the prosecutor, after proving that the defendant kept a public house, may prove that the defendant kept a bar with bottles in it. *People v. Hulbut*, 4 Denio, 133.

17. It is erroneous to admit evidence of a greater number

of offences than there are counts in the indictment. *Hodgman v. People*, 4 Denio, 235.

18. Ale is fermented liquor and an intoxicating drink within the meaning of the act of Missouri, 1851, amendatory of the act of March 25, 1845, and the person selling it without license, whether it be manufactured within or without the state, is indictable. *The State v. Lemp*, 16 Mis. (1 Bennett,) 389.

19. Where the state, on the trial of a complaint against B., for selling wine and spirituous liquor contrary to the statute, having introduced evidence to prove the facts alleged in the complaint, B., to rebut such evidence, adduced evidence to prove that at other times he had refused to sell; and thereupon the state, to show that such refusals of B. were not real, but a mere pretence, and thus to rebut B.'s evidence, offered in evidence a record of the court, showing the pendency, at the time of those refusals, of a prosecution against B. for selling wine and spirituous liquor in violation of the statute; it was held, first, that such record was admissible to show the existence of such prosecution at the time referred to, and thus to counteract the effect of B.'s evidence; second, that if B.'s evidence was irrelevant, and for that reason inadmissible, B. could not successfully claim a reversal of the judgment against him, on the ground that the evidence adduced to rebut his irrelevant evidence was also irrelevant. *Barnes v. The State*, 20 Conn. 254.

20. When an information on the Connecticut statute relating to the sale of spirituous liquors alleged, that on or about the 24th day of February, 1849, said A. did sell, and did offer to sell, by himself and by an agent, wines, spirituous liquors and other intoxicating beverage, to one B., being addicted to habits of intoxication, said A., knowing him to be so addicted, and said B. being also a common drunkard, it was held, 1. That the information was not bad for duplicity, because it charged A. with selling, and offering to sell, as these acts may have been parts of one and the same action; 2. That it was not obnoxious to this objection, because it averred that A. did the acts alleged, by himself and by an agent, as those acts may have been joint, and done

by both, acting together; 3. That for the same reasons, it was not bad for uncertainty or repugnancy. *Carnes v. The State*, 20 Conn. 232.

21. Where the prosecutor, in such case, for the purpose of proving that B. was a common drunkard, at the time of the sale, offered evidence to show that his habits of intoxication, of which proof had been given, continued for several weeks after the sale, it was held, that such evidence was admissible. *Id.*

22. Upon an indictment for selling one pint of rum, it is sufficient to prove that the respondent sold one quart of rum. *The State v. Moore*, 14 N. H. 451.

23. An agreement for the sale of a quart of liquor, the price of a quart being paid, and one pint taken away by the purchaser, the other pint remaining in the cask with other liquor, is a sale of less than a quart, under the statute of Indiana prohibiting such sales. *Murphy v. The State*, 1 Carter, (Ind.) 366.

24. In an action for the penalty, given by statute, for selling liquor without a license, plaintiff need not prove defendant had no license, which will be taken to be true, unless disproved by defendant. Neither will the plaintiff be required to show that the question of license or no license was submitted to the people, at the preceding charter or township election, in pursuance of c. 41 of the Revised Statutes of Michigan. *Smith v. Adrian*, 1 Mann. (Mich.) 495.

25. Where, in declaring for a penalty, given by c. 41 of the Michigan Revised Statutes, for selling spirituous liquor without a license, the plaintiff adopts the form of declaration given by § 32, he cannot be required, on the trial, to elect the penalty or penalties he seeks to recover. *Id.*

26. Where A. and B. are engaged as partners in keeping a recess, and selling liquor without a license, the selling of liquor by B. is the act of both, and may be given in evidence against A., in an action against him alone for the penalty. *Id.*

27. Upon the trial of an indictment, in several counts, for violations of the license law by the sale of spirituous liquors,

it is not error in the County Court to permit the prosecutor, after having given evidence tending to prove as many distinct breaches of the law by the respondent, within the time covered by the indictment, as there are counts in the indictment, to proceed and prove other sales within the same period of time. *The State v. Smith*, 22 Vt. (7 Washb.) 74.

28. The putting the prosecutor to his election for what offences he will proceed, in cases of this kind, is matter of practice, and should rest in the sound discretion of the County Court; and the most which the respondent can claim is, that the election should be made before he is called upon for his defence. *Id.*

29. Under the act "for the suppression of drinking-houses or tippling-shops," in Maine, legal proof that the liquors were kept for sale by the owner or keeper of them is an essential pre-requisite to a decree of forfeiture, where a claimant appears, and to the imposition of a fine; and neither the affidavit contained in the complaint, nor the recitals in the warrant, nor the officer's return, can be taken as evidence upon that point. *The State v. Robinson*, 33 Maine, (3 Red.) 564.

30. The retailing of spirituous liquors on Sunday, being a violation of the statute of Tennessee, of 1846, the grand jury have power, under the 13th section, to cause witnesses to come before them, to testify in relation thereto, and make presentment upon information thus obtained. *Doebler v. The State*, 1 Swan, (Tenn.) 473.

31. In Alabama, to render one liable to an indictment for retailing spirituous liquors, in quantities not less than a quart, and permitting the same to be drank on the premises, the liquor must be drank in some place over which he has the legal right to exercise authority or control. *Downman v. The State*, 14 Ala. 242.

32. To constitute the offence prohibited by the law of Texas, (sec. 2, c. 159, Digest,) it is not sufficient that the defendant sold ardent spirits in quantities less than one quart, without license; he must have kept a grocery for that purpose, without license, and sold spirits without license. *Ramsay v. The State*, 6 Eng. 35.

33. An indictment for unlawfully selling ardent spirits to A. will not authorize proof of selling to B. *Taggart's Case*, 8 Gratt. 697.

34. A license to one man to keep a tavern at his house in a village, will not authorize another, who formed a partnership with the first in the sale of the spirituous liquors, which the first was authorized to sell under his license, to sell liquors at a house on the same lot and within the same inclosure with the tavern. *Hall's Case*, 8 Gratt. 588.

35. In a prosecution for a violation of the license law, the question whether the liquor sold is, as a matter of fact, wholly or in part spirituous or intoxicating, is for the jury, not the court, to determine. *The State v. Wall*, 34 Maine, (4 Red.) 165.

36. The offence of selling spirituous liquors, in contravention of the Massachusetts Revised Statutes, c. 47, § 1, may be committed by a sale of such liquor mixed in small quantities with other unknown ingredients, and called for and sold as beer. *Commonwealth v. Bathrick*, 6 Cush. 247.

37. Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and if there is any defect in the manner of stating such matter, the defect will not vitiate the indictment. *Rawlings v. The State*, 2 Md. 201.

38. In a prosecution for unlawfully selling intoxicating liquor, if the defendant relies upon a license, the burden of proving such license is upon him. *State v. Woodward*, 34 Maine, (4 Red.) 293.

39. A single act of selling spirituous liquors without license constitutes an offence, under the statute of 1846. *The State v. Paddock*, 24 Vt. (1 Deane,) 312.

Larceny.

1. Where property is taken in a fair color of claim or title, a felonious intent is wanting, and it is, therefore, no larceny. *The State v. Homes*, 17 Mis. (2 Bennett,) 379.

2. The finder of lost property, which has no marks upon it

by which the owner can be ascertained, is not guilty of larceny, though he takes it *animo furandi*. *The State v. Conway*, 18 Mis. (3 Bennett,) 321.

3. The intention to steal must be formed at the time of taking the goods, to constitute larceny. *Ib.*

4. To constitute larceny, it is not important that the intention of the prisoner should be to convert the property to his own use, in the county where it is taken. *State v. Ware*, 10 Ala. 814.

5. To constitute the offence of larceny, the goods alleged to have been stolen must have been wrongfully or fraudulently taken and carried away, with the intent to convert them to the taker's own use, and make them his own property; if there be no such intention, it amounts to a trespass only, and not a larceny. If the taking be open, and in the presence of the owner or of other persons, it carries with it the evidence that it is only a trespass. *McDaniel v. State*, 8 S. & M. 401.

6. The common law offence of receiving stolen property is extended by statute in Michigan, so as to include one who aids in the concealment; and if one aids the principal felon in converting the property to his own use, he will be deemed to have aided in the concealment. *The People v. Reynolds*, 2 Mich. (Gibbs,) 422.

7. The prisoner had contracted with a gas company for a supply of gas. The quantity consumed was to be measured by a metre, rented by the prisoner of the company, and was to be paid for according to such measurement. The gas was conveyed from the company's main, through an entrance pipe (the property of the prisoner) to the metre, and from thence, by another pipe, called the exit pipe, to the burners. The prisoner, by inserting a connecting pipe into the entrance and exit pipes, diverted the gas from the metre, and thereby avoided paying for the full quantity of gas consumed. Held, that this was larceny of the gas; that there was a sufficient severance of the gas, at the point of junction of the connecting pipe with the entrance pipe, to constitute an asportation; that the property and possession of the gas were in the company; and that it was immaterial whether the service pipe

was the property of the prisoner or of the company. *Regina v. White*, 20 Eng. Law and Eq. Rep. 585.

8. Held, also, that the penalty for improperly diverting the gas, given by the local act of the company, must be considered only as an additional punishment, and did not reduce the offence below the grade of felony. *Id.*

9. A verdict of larceny should fix the value of the property stolen. *Ray v. The State*, 1 Iowa, (Greene,) 316.

10. On a *qui tam* prosecution for larceny, the prosecutor may be admitted to testify to the loss of the goods and the identity of them. *Gilbert v. Steadman*, 1 Root, 403.

11. The lapse of two months between the loss of articles stolen and the finding them, is not sufficient to rebut the presumption of guilt arising from their being found in the defendant's possession. *State v. Bennet*, Const. Rep. 692.

12. D. and G. were indicted in a single count, for jointly receiving stolen goods. It was proved that D. first received some of the goods; evidence was then given that G. afterwards, at a separate time and place, received another portion of them. The jury found both guilty. Held, that D. and G. could not properly be both convicted under the count for jointly receiving, on proof of separate acts of receiving; that as the evidence given against D. fully satisfied the allegation of a receiving, in the indictment, the evidence of receipt by G. ought not to have been admitted; and that, consequently, the conviction was good as against D., but ought to be reversed as against G. *Regina v. Dovey*, 2 Eng. Law and Eq. Rep. 532.

13. The identity of one indicted for larceny being proved only by the oath of one witness, whose testimony was shaken by circumstances, a verdict of "guilty" was set aside and a new trial granted. *State v. Wood*, 1 Rep. Con. Ct. 29.

14. On trial of an indictment for the larceny of a watch, evidence of another larceny of a cloak, committed by the prisoner, is not admissible for any purpose. *Walker's Case*, 1 Leigh, 574.

15. Where a miller was indicted for stealing barilla, and the evidence was, that he retained a part of it, returning a mixture of barilla and plaster of Paris, it was held, that the

commonwealth was not bound to produce the truckman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence to prove that it was adulterated by the defendant. *Commonwealth v. James*, 1 Pick. 375.

16. The owner of stolen bank bills is a competent witness on the prosecution for the stealing. *State v. Casados*, 1 N. & M. 91.

17. In a public prosecution for theft, in Connecticut, the owner of the goods is a competent witness to prove the facts alleged in the information. *Salisbury v. State*, 6 Conn. 101.

18. So, also, is an innkeeper, in whose inn and from whose guest the goods were stolen, a competent witness, in such prosecution, to prove the facts alleged in the information. *Ib.*

19. In an indictment for stealing bank notes, purporting on the face of them to be the notes of certain banks, the notes produced in evidence must correspond therewith. *Pomeroy v. Commonwealth*, 2 Virg. Cas. 342.

20. In a prosecution for stealing a bank note, if it is proved that the prisoner feloniously stole the note, and passed it away as genuine, he will be precluded from calling upon the government for further proof that the note was of value. *Cummings v. Commonwealth*, 2 Virg. Cas. 128.

21. In a prosecution for stealing a particular horse, it cannot be given in evidence that the defendant was associated with horse thieves. *Cheny v. State*, 7 Ham. (part 1st,) 222.

22. On the trial of an indictment for stealing a bank bill, note, &c., under the New York statute, (1 N. R. L. 174,) parol evidence of the contents of the bills or notes is admissible, without accounting for their non-production. *People v. Holbrook*, 13 Johns. 90.

23. On a charge of shop-breaking and larceny, possession of part of the stolen goods is *prima facie* evidence, both of the larceny of the whole property stolen and of the breaking and entering. *Commonwealth v. Millard*, 1 Mass. 6.

24. Possession of stolen goods is *prima facie* evidence of guilt; whether the circumstances amounted to a possession,

or how far they were such as to rebut the presumption, is for the jury to determine. *State v. Brewster*, 7 Vt. 122.

25. A jury may find a defendant guilty of petit larceny without proof of the value of the article stolen, if it is of any intrinsic worth. *State v. Slack*, 1 Bailey, 330.

26. In an indictment for stealing notes belonging to a certain corporation, the court is bound to presume, after verdict, that the corporate existence of the company was proved to the jury or admitted by the prisoner. *Lithgow v. Commonwealth*, 2 Virg. Cas. 297.

27. An indictment for larceny, charging that the goods stolen were the property of A., is not sustained by proof that they belonged to A. and B. as partners, and that they were, at the time of the larceny, in A.'s possession. *Hogg v. State*, 3 Blackf. 326.

28. An indictment for larceny is not supported by evidence that the defendant had received or purchased the goods, knowing them to be stolen, although, by statute, the punishment for the offence proved be the same with that charged. *Ross v. State*, 1 Blackf. 390.

29. Possession of stolen goods, by the prisoner, throws upon him the burden of accounting for their possession. *State v. Weston*, 9 Conn. 527.

30. Possession of stolen property, without being able to give a creditable account of the possession, is *prima facie* evidence of larceny. *Pennsylvania v. Myers*, Addis. 320.

31. Under an indictment for larceny, a taking as well as carrying away must be shown. *Pennsylvania v. Campbell*, Addis. 232.

32. Upon the trial of an indictment against a married woman for larceny, evidence that her husband had paid a sum of money to the prosecutor to procure his absence, is inadmissible on the part of the government, unless it is shown that the act was done with her knowledge. *Commonwealth v. Robbins*, 3 Pick. 63.

33. In an indictment for larceny, it is not indispensably necessary to produce the stolen notes upon the trial. *Moore's Case*, 2 Leigh, 701.

34. Particulars descriptive of the property stolen, inserted in an indictment for larceny, must be strictly proved, even though such as need not to have been inserted. *The State v. Jackson*, 30 Maine, (17 Shep.) 29.

35. A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred in which the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence is inadmissible, because the custom, which it purports to prove, is wanting in the elements of a legal custom, and cannot be sustained as such, and, if proved, would only be applicable to the officers of the vessel. *The Commonwealth v. Doane*, 1 Cush. 5.

36. In Mississippi, a negro is *prima facie* a slave, and a person taking one into his possession, with the intent to convert him to his own use, knowing, or having the means of knowing, the owner or master, would be guilty of larceny. *Coon v. The State*, 13 S. & M. 246.

37. After evidence of a larceny had been given, on the trial of an indictment for stealing a package of bank bills in December, it was held, that evidence that two of the bills, (which were identified,) each of the denomination of one hundred dollars, were in the defendant's possession, one of them in March and the other in April following, might be submitted to the jury, and that they might infer therefrom, and from accompanying circumstances, that he stole the whole package. Held, also, that although none of the stolen bills were identified, yet that evidence was admissible to prove that the defendant, after the larceny, was in possession of two one hundred dollar bills like those that were proved to have been stolen, and also a large amount of other bank bills; and that such evidence, together with evidence that the defendant was destitute of money before the larceny, might be submitted to the jury, to be considered by them,

in connection with other accompanying circumstances indicative of his guilt. *Commonwealth v. Montgomery*, 11 Met. 534.

38. The omission to state the value of the property stolen, in the warrant issued upon complaint, does not invalidate the warrant; the only effect of the omission is, that the offence charged will be deemed petit larceny. *Payne v. Barnes*, 5 Barb. Sup. Ct. 465.

39. The finding of a thing stolen in the possession of the accused affords evidence, to some extent, that he took it, which evidence, ordinarily, is stronger or weaker in proportion to the length of time intervening between the stealing and the finding. *State v. Williams*, 9 Ired. 140.

40. If a person finds a trunk or other article of personal property, in the highway, and converts the same to his own use, not knowing the owner, he is not guilty of larceny; but *aliter*, if he knows the owner, or has the means of identifying him, by marks on the property, which he understands, at the time of finding. *Lane v. The People*, 5 Gilm. 305.

41. Bees in the possession of the owner are the subject of larceny. *The State v. Murphy*, 8 Blackf. 498.

42. Where an indictment for larceny charged that the offence was committed in a vessel, in the First Ward of the city of New-York, and it appeared on the trial that the vessel was lying in the river at a wharf in the Third Ward, it was held not to be a material variance. *People v. Honeyman*, 3 Denio, 121.

43. To constitute a larceny, there must be a taking of the property of another without his consent, with the felonious intent to convert it to the use of the person taking it. And a wrongful taking, without such intent, is a mere trespass. *Witt v. State*, 9 Mis. 671.

44. In an indictment for stealing the property of A., a minor daughter of B., and living with him, the property should be described as the property of A., and not as the property of B.; the property being in the possession of A., and for her exclusive use. *The State v. Koch*, 4 Harringt. 570.

45. Where, on a trial for larceny, the court instructed the

jury, "that it must be proved that the original taking was felonious, but that the jury had a right to infer, from all the facts and circumstances of the case, the felonious intent of the original taking; and that not in one case in a hundred could it be proved directly that the original taking was felonious," it was held, that there was no error in the instruction. *Booth v. The Commonwealth*, 4 Gratt. 525.

46. An indictment charged A. with knowingly receiving stolen goods from B., a slave of C., which goods were the property of D.; and in another count the goods were stated to be the property of persons unknown. A. was convicted, and the verdict was sustained, because the last count covered the goods, and it was immaterial to prove in whom the property was; the secretion of the goods, and receiving them from B., the servant of the carrier, having been fully proven. *The State v. Tiedeman*, 4 Strobb. 300.

47. Turpentine, which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny; but where one was indicted for stealing two barrels of turpentine, and it appeared he dipped turpentine out of these boxes at different times, until he had taken nearly two barrels, it was held, that the evidence did not support the indictment. *The State v. Moore*, 11 Ired. 70.

48. On a trial for larceny in a hotel, it is competent for the commonwealth to prove the presence of the prisoner in the hotel on the night when the larceny was committed, and his acts and conduct there, and the circumstances attending his arrest, as a part of the whole transaction, though these acts amounted to an attempt to commit a felony on another person, in another part of the hotel. *Burr v. The Commonwealth*, 4 Gratt. 534.

49. On the trial of an indictment for larceny, it is error to permit evidence to go to the jury for the purpose of proving that, just before the defendant committed the act for which he is on trial, he committed another larceny. *Barton v. The State*, 18 Ohio, 221.

50. Where, on an indictment in which counts for horse stealing and grand larceny of other property are joined, the jury find a general verdict of guilty, assessing the value of

property in gross, without finding the amount charged in each count, and the court enter judgment on such finding, such judgment is erroneous, and will be reversed on error. *Ib.*

51. The fact that a portion of the chattels were found upon the premises of the accused eighteen months after they were stolen, unaccompanied by other suspicious circumstances, is not *prima facie* evidence that the accused was guilty of the larceny. *Warren v. The State*, 1 Iowa, (Greene,) 106.

52. A judgment against the prisoner, on an indictment for larceny, will not be disturbed, merely because, among the things stolen, there was an item, for taking which a person would not be liable for stealing, when it appears by the record that the exclusion of that item could not reduce the nature of the offence, nor materially lessen the amount of the fine. *Ib.*

53. A. was indicted for larceny of a breast-pin. To prove the larceny, the owner was called, who stated that another person, who was not called as a witness, told him it was stolen. B., who was employed to aid in detecting the thief, told A. that if he would get the pin, he would agree that the matter should drop. A. said that the pin was in the country, and he would send for it. It was often seen in A.'s possession, and he told different stories about it. The defendant was found guilty, and it was held, that all the witnesses who were present at the commission of the offence need not be called, if the crime be proved; that the declaration of the prisoner, that the pin was in the country, could be admitted; that its untruth might aid in establishing his guilt. *The State v. Clark*, 4 Strobb. 311.

54. Upon the trial of an indictment for larceny, the party injured is not a competent witness for the prosecution, if he be entitled to treble the value of the property stolen upon the conviction of the prisoner. *The State v. Pray*, 14 N. H. 464.

55. But as the payment of treble damages is a part of the sentence, and as there is no mode of enforcing it if it be not included in the sentence, if the witness agree to release all claim to it, and an entry be made on the record accordingly,

the court would not be warranted in including it in the sentence, and the competency of the witness will be restored. *Id.*

56. To constitute the offence of larceny, "by stealing from the person," within the Massachusetts Revised Statutes, c. 126, § 16, it is not necessary that the taking should be either openly and violently, or privily and fraudulently; but if it be with the knowledge, though without the dissent or resistance of the owner, the offence is equally committed, provided the taking be with an intention, on the part of the offender, to deprive the owner of his property. *The Commonwealth v. Dimond*, 3 Cush. 235.

57. Upon the trial of an indictment for stealing a bank note which had been lost in a public street, but had the name of the owner thereon, the judge told the jury, that if the prisoner knew the owner, or had reasonable ground for believing that he could be found at the time when he first resolved to appropriate the note to his own use, he was guilty of larceny; but if, at that time, he had not that knowledge or belief, he was not guilty. Held, a misdirection, because, if the prisoner, when he first took possession of the note, so as to know what it was, meant to act honestly with regard to it, no subsequent alteration of that intention, and conversion of the note to his own use, could render him guilty of larceny. *Regina v. Preston*, 8 Eng. Law and Eq. Rep. 589.

58. Pigeons kept in an ordinary dove-cote, having liberty of ingress and egress at all times, by means of holes at the top, may be the subjects of larceny. *Regina v. Cheafor*, 8 Eng. Law and Eq. Rep. 598.

59. Under the statutes of Missouri, a person who commits larceny in another state, and brings the stolen property into that state, may be indicted there for larceny. *Hemmaker v. The State*, 12 Mis. 453.

60. Where a person was indicted for stealing "one steer, one bull, one cow," &c., and the evidence was, that the defendant stole one steer, and there was a general verdict of guilty, it was held, that the evidence did not support the verdict, that the judge could not pass sentence thereon for stealing one steer, and that a new trial must be granted. *State v. Kersh*, 1 Strobb. 352.

61. Where the prisoner went away with the prosecutor's wife, and assisted her in placing wearing apparel and other articles in a box, also in removing the box from her husband's house; afterwards, while the prosecutor's wife remained in adultery with him, pledging some of the articles and applying the money to his own purposes, held, that the direction of the chairman of the quarter sessions to the jury, that if they were of opinion that the prisoner, going away with the prosecutor's wife for the purpose of adulterous intercourse, was engaged jointly with her in taking the goods, he was guilty of the felony, was a proper direction, and that the prisoner was rightly convicted of larceny. *Regina v. Thompson*, 1 Eng. Law and Eq. Rep. 542.

62. The owner of a slave having ascertained that a person designed to steal the slave, directed the slave to meet the prisoner and arrange to go away with him. The slave obeyed his master's order, and while proceeding to go away in his company, the prisoner was seized and the slave ran home. Held, that the prisoner had no such possession of the slave as would constitute the crime of larceny. *Kemp v. The State*, 11 Humph. 320.

63. On an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner. *Regina v. Oddy*, 4 Eng. Law and Eq. Rep. 572.

64. The prisoner was indicted for stealing money from a counting-house. The proof was, that he stole money from a building called "the machine-house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but were kept in another building on the premises called "the office," where the general books

and accounts of the concern were kept. Held, that there was evidence that the building was a counting-house within the act 7 and 8 Geo. IV. c. 29, § 15. *Regina v. Potter*, 4 Eng. Law and Eq. Rep. 575.

65. A., bargaining with B. about some waistcoats, said, "You must go to the lowest price, as it will be ready money." B. said, "Then you shall have them for twelve shillings;" to which A. assented. A. then said he should put the waistcoats into his gig, which was then standing at the door. B. replied, "Very well." A. drove off with the waistcoats, without paying for them, and absconded for two years. The jury returned the following verdict: "In our opinion, the waistcoats were parted with conditionally, that the money was to be paid at the time, and that A. took them with a felonious intent." Held, a larceny in A. *Regina v. Cohen*, 5 Eng. Law and Eq. Rep. 545.

66. On an indictment for larceny, it appeared that the alleged owner of the property stolen bought the same at a sheriff's sale, subject to a mortgage, after condition broken, as the property of the prisoner, and had the lawful possession. Held, that this was sufficient to support the allegation. *Robinson v. State*, 1 Kelley, 563.

67. The possession of property recently stolen is *prima facie* evidence of guilt in the possessor of the property, but it may be satisfactorily accounted for, as that the accused purchased it, in a public manner, unconnected with circumstances of guilt. *Jones v. The People*, 12 Ill. 259.

68. Where a statute makes the nature or duration of punishment for receiving stolen goods depend upon the value of the goods, a verdict of guilty, without specifying the value, is not sufficient to support a judgment. *Sawyer v. People*, 3 Gilm. 53.

69. An indictment for larceny, charging the goods stolen to be the property of A., is not supported by evidence that they were the property of A. and B., who were partners. *Commonwealth v. Trimmer*, 1 Mass. 476.

70. On a prosecution for larceny in stealing bank bills of another state, the prosecutor must show the existence of the banks and the genuineness of the bills. *Johnson v. People*, 4 Denio, 364.

71. Evidence that bills of the same kind have been received and passed away, in the ordinary course of business, as a part of the currency of the country, would be presumptive evidence of the existence of the bank and of the genuineness of the bills. *Ib.*

72. The fact that a witness for the prosecution, who was a broker, had exchanged the bills alleged to have been stolen, giving other money for them, after the larceny, but who did not speak of any former knowledge of such bills, or express any belief as to their genuineness, is no evidence that the bills were genuine. *Ib.*

73. In the trial of an indictment for stealing a horse, it is not necessary to prove, by direct evidence, that the horse was of some value, but this may be sufficiently established by proof of facts from which the jury may infer it—such as the assertion of the prisoner that he borrowed the horse—that a witness went a hundred miles to hunt the horse—that the horse travelled one hundred miles and back again, &c. *Houston v. The State*, 8 Eng. (13 Ark.) 66.

74. In order to constitute larceny, there must be a taking of the goods, either actual or constructive; and the felonious intent must exist at the time of the taking; otherwise, no subsequent felonious intent will render the previous taking felonious. *Fulton v. The State*, 8 Eng. (13 Ark.) 168.

75. Evidence tending to establish the offence of embezzlement is not admissible under an indictment for larceny; nor can the law defining the former, and prescribing the punishment, govern on an indictment for the latter offence. *Ib.*

76. A recent possession of stolen goods makes out a *prima facie* case of guilt; and a conviction must follow, in the absence of explanatory or contradictory proof. *Hughes v. State*, 8 Humph. 75.

77. On the trial of an indictment for receiving stolen goods, the principal felon is a competent witness on behalf of the state. *State v. Coppenburg*, 2 Strobbh. 273.

78. Possession of stolen property, after the theft, to raise a presumption of guilt, must be recent; possession at “any time” will not raise the presumption. “Any time” may re-

fer to a period too remote ; it must be recent. *The State v. Wolff*, 15 Mis. 168.

79. When various articles of property, other than those mentioned in the indictment, are found in the defendant's possession, there may be some pretext for proving them to be stolen, in order to fix a guilty knowledge upon him ; but when the things stolen were found in the possession of another, with whom the defendant had been living a short time, as a hired hand, such evidence is not admissible. *Ib.*

80. Possession of stolen property, to raise a presumption of guilt, must be recently after the theft. *The State v. Floyd*, 15 Mis. 349.

81. On a trial of an indictment for larceny of bank bills, some evidence that the bills are of value and genuine is necessary ; but not so much as would be necessary in an action to recover the money due on them. *The State v. Smart*, 4 Rich. 356 ; *Sartorius v. The State*, 24 Miss. 602.

82. The mere purchase of stolen goods under their value is not a presumption of knowledge that they were stolen. *Ib.*

83. When a party having possession of stolen goods denies it, it is not a presumption of guilt, if the denial results from a misunderstanding. *Ib.*

84. Where it was proved by a witness for the prosecution that, being out with the defendant's son, hunting cattle in the prairie, he first saw the yearling heifer in question ; that the son claimed it as the property of his father, and drove it up and penned it in the defendant's cow-pen ; that it was publicly claimed by the defendant as his property, and publicly branded by him ; that when the witness told him he was acting imprudently in branding it, as it had on the brand of Tom, the prosecutor, he replied that it was his own, and he would do it ; it was held, that the evidence did not warrant a conviction for larceny. *Herber v. The State*, 7 Texas, 69.

85. It must be proved, in order to sustain a conviction under the 27th section of the act of Texas of 1848, (Hart's Dig art. 523,) that property stolen was of the value of twenty dollars. *Langford v. The State*, 8 Texas, 115.

86. Where property has been taken *lucri causa*, it is of

course of primary importance to ascertain whether there are any circumstances tending to fasten guilty agency on the party with whom they are found. The possession of the stolen property, as has already been seen, is in itself a strong presumption of guilt. *Com. v. Hope*, 22 Pick. 1.

87. Though it applies only when the possession is of a kind which manifests that the stolen goods have come to the possessor by his own act, or at all events with his undoubted concurrence. *State v. Smith*, 2 Ired. 402.

88. Where, however, property is stolen, and the person accused of the offence, shortly after its commission, points out the place where it is concealed, he must be considered the thief, unless he can reconcile his knowledge with his innocence. *Hudson v. State*, 9 Yerg. 408.

89. Where the defendant, Scipio Smith, and two of his sons who lived with him, were indicted for stealing tobacco, and the tobacco, which had been stolen in the night, was found the next day in an out-house of Scipio's, occupied by one of his negroes, and in which Scipio kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proven to be the tobacco that had been stolen, it was held, that it was an error in the judge to charge the jury "that the possession of the stolen tobacco thus found on Scipio Smith raised, in law, a strong presumption of his guilt." *State v. Smith*, 2 Ired. 402.

90. Strong evidence showing concealment is clearly admissible. Thus, on the trial of an indictment for having obtained the property of another by threats, evidence that the same property was discovered, in a concealed state, in the house of the prisoner, is admissible, as going to show that the prisoner was conscious of having obtained it improperly. *State v. Bruce*, 11 Shep. 71.

91. The prisoner, in conjunction with the wife of a man who was charged with stealing a horse, went to the stable of the owner, took the horse out, and backed it into a coal pit. It was objected for the prisoner, on an indictment for stealing the horse, that it was not taken *animo furandi* and *lucricausa*. The prisoner being convicted, the opinions of the judges were taken, who thought the conviction right. Six

of the judges held it not to be essential to constitute the offence of larceny, that the taking should be *lucri causa*. They thought that a taking fraudulently, with an intent wholly to deprive the owner of the property, was sufficient; but some of the six thought, that in this case the object of protecting the party charged with stealing the horse might be deemed a benefit, or *lucri causa*. Two of the judges held the conviction wrong. *Cabbage's Case*, Russ. & Ry. 292.

92. The prisoners were charged with stealing a quantity of beans. They were servants of the prosecutor, and took care of his horses, for which the prosecutor made an allowance of beans. The prisoners had entered the granary by a false key, and carried away a quantity of the beans, which they gave to the prosecutor's horses. BAILEY, J., had directed an acquittal in a similar case; but ABBOTT, J., being informed that several judges had, under the same circumstances, held the offence to be larceny, reserved the point. Eleven of the judges having met, eight were of opinion that it was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost the beans, or had them applied to the injury of his horses, but the men's labor was lessened, so that the *lucri causa*, to give themselves ease, was an ingredient in the case. Three of the judges thought it no felony. *Morfit's Case*, Russ. & Ry. 307.

93. The least removing of the thing taken from the place where it was before, though it is not quite carried off, is a sufficient taking and carrying away to constitute larceny. *Scott et al.*, 5 Rogers' Rec. 169.

94. The prisoner got into a wagon, and taking a parcel of goods which lay in the fore part, had removed it to near the tail of the wagon, when he was apprehended. The twelve judges were unanimously of opinion that, as the prisoner had removed the property from the spot where it was originally placed, with an intent to steal, it was a sufficient *taking*

and *carrying away* to constitute the offence. *Coslett's Case*, 1 Leach, 236 ; 2 East P. C. 556.

95. Where the prisoner had set up a parcel containing linen, which was lying lengthways in a wagon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken any thing, all the judges agreed that this was no larceny, although the intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them. *Cherry's Case*, 2 East P. C. 556 ; 1 Leach, 236.

96. The prisoner, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and both holding it, endeavored to pull it out, but were prevented by the guard. The prisoner being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. *Walsh's Case*, 1 Moody, (C. C.) 14.

97. The prisoner was indicted for robbing the prosecutrix of a diamond ear-ring. It appeared that as she was coming out of the opera-house, the prisoner snatched at her ear-ring, and tore it from her ear, which bled, and she was much hurt. The ear-ring fell into her hair, where it was found on her return home. On a case reserved, the judges were of opinion that it was sufficient taking to constitute robbery ; it being in possession of the prisoner for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant it was taken. *Lapier's Case*, 2 East P. C. 557.

98. Where, upon an indictment for stealing a horse, two saddles, &c., it appeared that the prisoner got into the prosecutor's stables, and took away the horse and the other articles altogether ; but when he had got to some distance he turned the horse loose, and proceeded on foot, and attempted to sell

the saddles; GARROW, B., left it to the jury to say whether the prisoner had any intention of stealing the horse, for that if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for the purpose, he would not, in point of law, be guilty of larceny. *Crump's Case*, 1 C. & P. 658.

99. The prisoner was indicted for stealing a straw bonnet. It appeared that he entered the house where the bonnet was, through a window which had been left open, and took the bonnet, which belonged to a young girl whom he had seduced, and carried it to a hay-mow of his own, where he and the girl had been twice before. The jury thought that the prisoner's intent was to induce the girl to go again to the hay-mow, but that he did not mean to deprive her of the bonnet. On a case reserved, the judges held that this taking was not felonious. *Dickinson's Case*, Russ. & Ry. 420.

100. A gentleman left a trunk in a hackney coach, and the coachman taking it, converted it to his own use; this was held to be larceny; for the coachman must have known where he took the gentleman up and where he set him down, and ought to have restored his trunk to him. *Lamb's Case*, 2 East P. C. 664.

101. The prosecutor having had his hat knocked off in a quarrel with a third person, the prisoner picked it up and carried it home. Being indicted for larceny, PARKE, J., said, "If a person pick up a thing, and knows that he can immediately find the owner, but, instead of restoring it to the owner, converts it to his own use, this is felony. *Pope's Case*, 6 C. & P. 346.

102. Where A. picked up the purse of B., containing money, which had no mark on it, on a turnpike road along which B. had previously travelled by coach, and converted the purse and contents to his own use, PARKE, B., held, that this was no larceny; that A. was liable civilly but not criminally; but that if there had been any mark on the purse by which it could have been known, it would have been otherwise. *R. v. Mole*, 1 C. & K. 417.

103. Where a servant, indicted for stealing bank notes, the

property of her master, in his dwelling-house, set up in her defence that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertised, *PARKE, J.*, held, that she ought to have inquired of her master whether they were his or not, and that not having done so, but having taken them away from the house, she was guilty of larceny. *Kerr's Case*, 8 C. & P. 176.

104. If a party finds a chattel, under circumstances which leave no doubt to whom it belongs, and takes it away with the intention to appropriate it, and only restores it because a reward is offered, he is guilty of larceny. *R. v. Peters*, 1 C. & K. 245.

105. Where property, (*e. g.*, a pocket-book containing bank bills,) with no mark about it indicating the owner, was lost, and found in the highway, and there was no evidence to show that the finder at the time knew who the owner was, held, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterwards. *The People v. Cogdell*, 1 Hill, 94.

106. Where a letter containing a bill of exchange was by mistake delivered to another person of the same name as the person to whom it was addressed, and the person to whom it was so delivered converted the bill of exchange to his own use, being convicted of larceny for this act, a case was reserved for the opinion of the judges, who held the conviction wrong, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter; and a pardon was recommended. *Mucklow's Case*, 1 Moody, (C. C.) 160.

107. Where the prosecutor had delivered a horse to the prisoner, to be agisted at 1s. 6d. per week, and the latter, after keeping the animal for one week, for which he received payment, sold it in the course of the second week, the prisoner having been convicted of larceny, the judges held the conviction wrong. *Charles Smith's Case*, 1 Moody, (C. C.) 474.

108. Where goods were delivered by the prosecutor to the prisoners, (who were not carriers, and employed by him on

that occasion,) to be conveyed by them, but they were to be paid for carrying them, and instead of taking them to the place directed, they stole the goods, but without opening any of the packages, it was ruled by PATTESON, J., to be no felony. *Fletcher's Case*, 4 C. & P. 545.

109. Where A. allowed B. to take up a sovereign from the table of a beer-house, for the purpose of getting change, and B. never returned with the sovereign or the change, COLERIDGE, J., after consulting GURNEY, B., held that there was no larceny of the sovereign; that the prosecutor, having given the sovereign to be taken away for change, had divested himself of the entire possession of it. *R. v. Thomas*, 9 C. & P. 741.

110. An indictment, which charges a larceny or embezzlement of the printed sheets of a certain publication, is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant, after he had folded, stitched, bound and trimmed them, embezzled and fraudulently converted them to his own use. In such case the indictment should charge a larceny or embezzlement of books. *Commonwealth v. Merrifield*, 4 Met. 468.

111. The prisoner, who was the owner of a boat, was employed by the prosecutor, the captain of a ship, to carry a number of wooden staves to the shore in his boat. The prosecutor's men were put into the boat, but were under the control of the prisoner, who did not deliver all the staves, but took one of them away to the house of his mother. PATTESON, J., held, that this was a bailment, and not a charge, the prosecutor's servant being under the prisoner's control, and that a mere non-delivery of the staves would not have been a larceny; but that if the prisoner separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and would be sufficient to constitute a larceny. The learned judge left it to the jury to say, whether the prisoner removed the staff to his mother's with intent to convert it to his own use. The prisoner was acquitted. *Howell's Case*, 7 C. & P. 325.

112. Where a letter is given to deliver to another, breaking

it open and taking out money is larceny. *Cheudle v. Buell*, 6 Ohio, 67.

113. He that has the care of another's goods, says Lord HALE, has not the possession of them, and therefore may, by his felonious embezzling of them, be guilty of felony; as the butler who has charge of his master's plate, the shepherd who has the charge of his master's sheep; and so it is of an apprentice that feloniously embezzles his master's goods. 1 Hale, 506.

114. A. employed B. to take his barge from one particular place to another, and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge sixteen miles, and paid tonnage dues to an amount rather under £2, and appropriated the remaining sovereign to his own use. Held to be larceny. *R. v. Goode*, Carr. & M. 582.

115. Where the clerk of a banker told a customer of the house that he had paid the money to his account, and thereby induced the customer to give him a check to the amount, for which the prisoner took bank notes out of the drawer, and afterwards made fictitious entries in the books, to prevent a discovery of the transaction, it was held, on a case reserved for the opinion of the judges, that this was a felonious taking of the bank notes from the drawer, and not an obtaining of them under a false pretence. *Hammon's Case*, 2 Leach, 1,083.

116. A. had agreed to buy straw of B., and sent his servant, C., to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in the courtyard of A., and then went to A. and asked him to send some one with the key of the hay-loft, which was over the stable, which A. did, and C. put part of the straw into the hay-loft, and carried the rest away to a public house and sold it. TINDAL, C. J., held that the carrying away of the straw by C., if done with a felonious intent, was a larceny, and not embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable door. *R. v. Hayward*, 1 C. & K. 518.

117. If the master had no otherwise the possession of the

goods than by the bare receipt of his servant, upon the delivery of another for the master's use, and the servant have done no act to determine his original, lawful and exclusive possession, as by depositing the goods in his master's house, or the like ; although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect to the servant himself, upon a charge of larceny at common law, in converting the goods to his own use ; because, as to him, there was no tortious taking in the first instance, and consequently no trespass, as there is where a servant converts to his own use property in the virtual possession of his master. 2 East P. C. 568.

118. Where a servant was sent by his master to get change of a £5 note, which he did, saying it was for his master, but never returned, being convicted of stealing the change, the judges, on a case reserved, held this to be no larceny, because the master never had possession of the change except by the hand of the prisoner. *Sullen's Case*, 1 Moody, (C. C.) 129.

119. Where A. owed the prosecutor £5, and paid it to the prisoner, who was the prosecutor's servant, supposing him authorized to receive it, which he was not, and the prisoner never accounted for the money to his master, held, that this was neither embezzlement nor larceny. *R. v. Hawtin*, 7 C. & P. 281.

120. Where a party, fraudulently and with intent to steal, obtains possession of a chattel, with the consent and by the delivery of the owner, under pretence of borrowing, and converts the chattel to his own use, he is guilty of larceny. *Starker v. Commonwealth*, 7 Leigh, 752.

121. When the prisoner procured a parcel from the servant of a carrier, by falsely pretending that he was the person to whom it was addressed, and being indicted for larceny, the jury found that when the prisoner obtained the goods he knew they were not his own property, and intended to steal them, the judges, on a case reserved, held, that the conviction of the prisoner for larceny was right, on the ground that the ownership of the goods was not parted with, the carrier's servant having no authority to part with the ownership to

the prisoner, and the taking was, therefore, larceny. *Longstreeth's Case*, 1 Moody, (C. C.) 137.

122. On an indictment for stealing a receipt, it appeared that a landlord went to his tenant (who had removed all his goods) to demand his rent, amounting to £12 10s., taking with him a receipt ready written and signed. The tenant gave him £2, and asked to look at the receipt. On being handed to him he refused to return it or to pay the remainder of the rent. The landlord, at the time he gave the prisoner the receipt, thought the prisoner was going to pay him the rent, and would not have parted with the receipt unless he had been paid all the rent; but when he put the receipt into the prisoner's hands he never expected to have it again, and did not want it again, but wanted his rent paid. Held, that this was larceny of the receipt, and that the fact of the prisoner paying the £2 made no difference. *R. v. Rodway*, 9 C. & P. 784.

123. The prisoner was indicted for stealing two silver cream ewers from the prosecutor, a silversmith. He was formerly servant to a gentleman who dealt with the prosecutor, and some time after he had left him he called at the prosecutor's shop, and said that his master (meaning the gentleman whose service he had left) wanted some silver cream ewers, and desired the prosecutor to give him one, and put it down to his master's account. The prosecutor gave him two ewers, in order that his master might select the one he liked best. The prisoner took both, sold them, and absconded. At the trial the prosecutor swore that he did not charge the master (his customer) with the cream ewers, nor did he intend to charge him with either, until he had first ascertained which of them he had selected. It was objected for the prisoner, that this amounted merely to obtaining goods under false pretences; but BAXLEY, J., held, that as the prosecutor intended to part with the possession only, and not with the right of the property, the offence was larceny, but that if he had sent only *one* cream ewer, and had charged the customer with it, the offence would have been otherwise. *Davenport's Case*, Newcastle Spring Assizes, 1826; Archbold's *Peel's Acts*, 5.

124. The prisoner having bargained for some oxen, of which he agreed to become the purchaser, went to the place where they were in the care of a boy, took them away, and drove them off. By the custom of the trade, the oxen ought not to have been taken away till the purchase money was paid. GARROW, B., left it to the jury to say whether, though the beasts had been delivered to the prisoner under a contract, they thought he originally got possession of them without intending to pay for them, making the bargain the pretext for obtaining them, for the purpose of stealing them. The jury having found in the affirmative, the judges, in a case reserved, were unanimously of opinion that the offence amounted to felony. *Gilbert's Case*, Gow. N. P. C. 225.

125. The prisoner, who had previously pawned certain articles at the shop of the prosecutor, brought a packet of diamonds, which he also offered to pawn, receiving back the former articles. The prosecutor's servant, who had authority to act in his business, after looking at the diamonds, delivered them back to the prisoner to seal up, when the prisoner substituted another parcel of false stones. He then received from the prosecutor's servant the articles previously pledged, and carried them away. Being indicted for stealing these articles, ARABIN, S., before whom he was tried, thought that inasmuch as the property was parted with by the pawnbroker's servant, absolutely under the impression that the prisoner had returned the parcel containing the diamonds, the offence did not amount to felony, and upon a case reserved, the judges resolved unanimously that the case was not larceny, because the servant, who had a general authority from his master, parted with the property, and not merely with the possession. *Jackson's Case*, 1 Moody, (C. C.) 119.

126. Ice, put away in an ice-house for domestic use, is private property, and as such the subject of larceny. *Ward v. The People*, 3 Hill, 395.

127. So turpentine which has flowed from trees into boxes. *The State v. Moore*, 11 Ired. 70.

128. Evidence must be given to show the identity of the property taken. But a resemblance between the article stolen and the article lost, will, in some cases, be sufficient

without positive proof of the identity, as in the case of corn or sugar stolen. *R. v. Mansfield*, Carr. & M. 140.

129. In larceny of a bank note, it must be proved to be genuine. *State v. Tillery*, 1 Nott & M'Cord, 9.

130. To sustain an indictment for larceny, proof must be adduced that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that a felony has been committed. *State v. Furlong*, 19 Maine, 225.

131. If the goods of A. be stolen by B., and afterwards they be stolen from B. by C., an indictment against the latter may allege the title to be in either A. or B., at the election of the pleader. *Ward v. The People*, 3 Hill, 395.

132. Where the prisoner, who was employed by the prosecutors as an occasional clerk, received from them a check on their bankers, payable to a creditor, for the purpose of giving it to such creditor, and the prisoner caused the check to be presented by a third party, and appropriated the amount to his own use, and being found guilty of stealing the check, the judges affirmed the conviction. *Metcalf's Case*, 1 Moody, (C. C.) 433.

133. Goods seized by the sheriff under a *fi. fa.* remain the property of the defendant until a sale. *Lucas v. Nockells*, 10 Bing. 182.

134. The goods of an adjudged felon, stolen from his house, in the possession of and occupation of his wife, may be described in an indictment for larceny as the goods of the Queen; but the house cannot be so described without office found. *R. v. Whitehead*, 2 Moody, (C. C.) 181.

135. Where a friendly society had appointed a treasurer and two trustees, one of the trustees was held guilty of larceny in stealing the money of the society, the money being alleged in the indictment to be the property of the treasurer, and the jury having found that the prisoner had obtained the money from the treasurer, with intent to steal it. *R. v. Cain*, 2 Moody, (C. C.) 204.

136. On an indictment for stealing the goods of A. and B., evidence that some belonged to A. and some to B., will not do. *State v. Ryan*, 4 M'Cord, 116.

137. In an indictment for larceny, proof that the person alleged to have been the owner had a special property in the thing, or that he had it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support that allegation in the indictment. *State v. Somerville*, 21 Maine, 14.

138. Where the *landlord of a public house* had the care of a box belonging to a benefit society, and by the rules he ought to have had a key, but in fact had none, and two of the stewards had each a key, the box being stolen, upon an indictment laying the property in the landlord, PARKE, J., held, that there was sufficient evidence to go to the jury, of the property being in the landlord alone. *Wymer's Case*, 4 C. & P. 391.

139. A house was taken by Kyezor, and Miers, who lived on his own property, carried on the business of a silversmith there for the benefit of Kyezor and his family, but had himself no share in the profits, and no salary, but had power to dispose of any part of the stock, and might, if he pleased, take money from the till as he wanted it. Miers sometimes bought goods for the shop, and sometimes Kyezor did. BOSANQUET, J., held that Miers was a bailee of the stock, and that the property in a watch stolen out of the house might properly be laid in him. *R. v. Bird*, 9 C. & P. 44.

140. Where one has received money for himself and for another, for whom he acted as agent, and to whom he had given credit for his share, it is well alleged in the indictment for larceny, that the money was the property of the person receiving it. *State v. Grant*, 22 Maine, 171.

141. Where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they were stolen, and were still in the same state, PATTESON, J., held, that as they were not articles such as pass from hand to hand readily, it was a question for the jury whether the usual presumption did not arise. *Partridge's Case*, 7 C. & P. 551.

142. The prisoner was indicted in October for stealing a shirt. Evidence was adduced to show that he had had access to the premises of the prosecutor about twelve months

since, and the shirt was sworn to have been safe in the prosecutor's possession somewhat about the same period of time. It was missed in the March previous to this indictment, and was found upon the prisoner when he was apprehended. It was submitted for the prosecution that there was sufficient evidence to go to the jury to prove the prisoner was the thief. But POLLOCK, C. B., said, "It will be pushing the doctrine of possession rather too far to hold this sufficient. There is a certain period, after which I should think it very unfair to assume theft from mere possession, even where the property is proved *aliunde* to have been stolen. Still less can I infer felony where, from any thing that appears, the article may never have been stolen at all." COLERIDGE, J., assented, and the jury were directed to acquit. *R. v. Hall*, 1 Cox C. C. 231.

143. Proof that the person charged with a larceny was poor, and that for years before he had not been the owner of property to the amount alleged to have been stolen; that he had made false statements as to where he obtained the property, and that when selling it, he called himself by a wrong name, and that he did not or could not give any account how he came by the property, though tending strongly to implicate his integrity, has no tendency to prove the ownership of the property stolen, as alleged. *State v. Furlong*, 19 Maine, 225.

144. In an indictment for stealing three sides of sole leather, the property of A. B., where the alleged owner testified that he could not swear positively that "he had not lost leather, or that he had not sold the same leather to some other person than the defendant," this is not sufficient proof that the ownership of the property was, at the time of the taking, in the person described as owner in the indictment. *Id.*

145. The rule that where property is stolen in one county, and is carried by the thief into another, he may be convicted of larceny in the latter county, applies as well to property which is made the subject of larceny by statute, as to property which is the subject of larceny by the common law. *Commonwealth v. Rand*, 7 Met. 475.

146. The legal possession of goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation. And therefore it was held, that if goods were stolen before the Revised Statutes took effect, and were retained in the possession of the thief until after they came into operation, he might be indicted and punished under these statutes. *State v. Somerville*, 21 Maine, 14.

147. The prisoner was tried in Kent for stealing two geldings in that county. The horses were stolen in Sussex. The prisoner was apprehended with them at Croydon in Surrey. The only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon he said he had been at Dorking to fetch the horses, and that they belonged to his brother, who lived at Bromley. The police officer offered to go to Bromley. They took the horses and went as far as Beckenham church, when the prisoner said he had left a parcel at the Black Horse, in some place in Kent. The police officer went thither with him, each riding one of the horses; when they got there the officer gave the horses to the hostler. The prisoner made no inquiry for the parcel, but effected his escape, and afterwards was again apprehended in Surrey. The prisoner was convicted, but sentence was not passed, GASELEE, J., reserving the question whether there was any evidence to support the indictment in Kent. The judges were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent, and that no judgment ought to be given upon the conviction, but that the prisoner should be removed to Surrey. *Simmond's Case*, 1 Moody, (C. C.) 408.

148. The prisoner was indicted for larceny at common law, for stealing a quantity of lead in Middlesex. It appeared that the lead was stolen from the roof of the Church of Iver, in Buckinghamshire. The prisoner being indicted at the Central Criminal Court, which has jurisdiction in Middlesex and not in Buckinghamshire, the judges (PARKE, J., ALDERSON, B., and PATTESON, J.) held that he could not be convicted there, on the ground that the original taking not being a larceny, but a felony, created by statute, the subsequent pos-

session could not be considered a larceny. *Millar's Case*, 7 C. & P. 665.

149. An indictment for receiving stolen goods must aver from whom the goods were received, so as to show that they were received from the principal felon. If received from any other person, the statute does not apply. *The State v. Ives*, 13 Ired. 338.

150. An indictment for larceny of "bank notes," *eo nomine*, which states their number, denomination and value, is sufficient. *The State v. Williams*, 19 Ala. 15.

151. If larceny from the house or any other offence not capital, committed by a slave, has been done by the procurement of a free white person, the law substitutes him or her in the place of the slave, and treats them as principal in the crime. *Berry v. The State*, 10 Geo. 511.

152. In an indictment for larceny from the house, the accusation was in these words: "The said A. feloniously entered the dwelling-house of the said B. in the night time, and having so entered, seven thousand dollars, to wit, two thousand dollars in gold and silver coin of the value of two thousand dollars, and five thousand dollars in bank bills of the value of five thousand dollars, the property of the said B., in the said dwelling-house, being then and there found, did privately and feloniously take and carry away, with intent to steal the same." Held, that the description of the money was sufficiently particular; and that it was not necessary to allege or prove what portion of the coin were Washingtons or eagles, or Spanish milled dollars; or that the bank bills were each of such a date, issued by a particular bank, and payable to some certain person. *Ib.*

153. In an indictment for larceny from the house, it is not necessary to allege that the accused entered with an intent to steal; the crime may be consummated where the original entry was not felonious. *Ib.*

154. Proof that a trunk was taken and carried away from the house, in which there was money, is sufficient to sustain a charge of taking and carrying away money, especially when all the facts show the *quo animo* with which the trunk was taken. *Ib.*

155. In a prosecution for larceny against one who is proved to be a "negro of black complexion," no plea is necessary to raise the question of jurisdiction, as to the person of the defendant, in the court in which the prosecution is pending. The defence which denies the jurisdiction, because the prisoner is a slave, may be made upon the trial under the plea of "not guilty." *Bennett v. The State*, 1 Swan, (Tenn.) 411.

156. If an indictment contains several counts, charging the same larceny in different modes, the defendant cannot, without showing other cause than what appears on the face of the indictment, on motion, compel the prosecutor to elect on which count he will proceed; but the prosecutor may apply the evidence relating to the larceny to which ever count it will sustain; but if, on the trial, the evidence tends to show distinct larcenies, which might be embraced in the indictment, the prosecutor will be compelled to elect as to which of the larcenies he will rely upon on the trial, and confine his evidence to that. *Engleman v. The State*, 2 Carter, (Ind.) 91.

157. In a prosecution for larceny, the fact that stolen property is found upon the person of the defendant can always be given in evidence against him; but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case. *Id.*

158. In an indictment for larceny, if a felonious taking and carrying away is charged, it is not necessary to use the word "steal." *Id.*

159. A defendant was indicted for simple larceny, in stealing a slave, and the evidence on the trial showed that the defendant, by his own confessions, made a promise to carry the slave, with others, north, the slave consenting to be sold once on the way. Held, that the jury might, under the 45th section of the 14th division of the Penal Code of Georgia, find the defendant guilty of an attempt to commit the offence charged in the indictment, without any special count for that purpose. *Clifford v. The State*, 10 Geo. 422.

160. Two slaves were stolen or inveigled in the state of Florida, and found in Alabama in the possession of the prisoner, who proved that he had obtained them from one

Smith, by a sale, or what purported to be a sale, from Smith to him. Held, that he could not be convicted on an indictment for stealing the slaves, without proof that they were stolen by him in Florida, and were brought by him into Alabama. *The State v. Adams*, 14 Ala. 486.

161. The prisoner, A., had the charge of the prosecutor's warehouse, in which bags were kept; the prisoner, B., for some years had been in the habit of supplying the prosecutor with bags, which were usually placed outside the warehouse, and shortly after so leaving them, either B. or his wife called and received payment for them. The prisoner, A., went into his master's warehouse, and clandestinely removed twenty-four bags, which had been marked by his master, and placed them outside the warehouse, in the place where B. used to deposit the bags before payment of them. Soon afterwards the wife of B. came and claimed payment for the said twenty-four bags. The prosecutor then sent for the prisoner, B., who, upon being asked respecting the twenty-four bags, said they had been placed there an hour previously by him, and demanded payment for them. The jury found that the bags had been so removed in pursuance of a previous arrangement between the prisoners. Held, that A. was rightfully convicted of larceny, and that B. was an accessory before the fact of the larceny. *Regina v. Manning*, 14 Eng. Law and Eq. Rep. 548.

162. A. drove away a flock of lambs from a field, and in so doing inadvertently drove away along with them a lamb, the property of another person, and as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. Held, that as the act of driving the lamb from the field, in the first instance, was a trespass, as soon as he appropriated the lamb to his own use, the trespass became a felony. *Regina v. Riley*, 14 Eng. Law and Eq. Rep. 544.

163. Two men, A. and B., acting in concert, and intending to defraud C., entered the shop of C., and by means of an artifice induced him to draw a check on his bank for £12, payable in the name of the prisoner, A., and then to accompany A. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the pay-

ment to C. of forty-two sovereigns, and that the prisoner, B., was to remain at the shop till A. and C. went and returned from the bank. At the bank, by the desire of C., the banker handed four ten pound notes and two sovereigns to the prisoner, A., in the presence of C. The prosecutor, C., and the prisoner, A., left the bank together, and while on their way back to C.'s shop, A. went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes and the two sovereigns, which he and the prisoner, B., who in the mean time had gone off from the shop with the forty-two sovereigns, appropriated to their own use. Held, that the misappropriation of the notes and two sovereigns was larceny, C. never having parted with the property and possession in them, and the prisoner, A., having had no more than the bare custody of the money which he carried off. *Regina v. Johnson*, 14 Eng. Law and Eq. Rep. 570.

Libel.

1. Evidence that the identical charges conveyed in the libel had, before the time of composing and publishing the libel, appeared in another publication, which was brought to the prosecutor's knowledge, but against the publisher of which he took no legal proceedings, is not admissible under a plea of justification under statute 6 and 7 Vict. c. 96, § 6. *Regina v. Newman*, 18 Eng. Law & Eq. Rep. 113.

2. A document under the seal of the court of the holy office or inquisition of Rome, but apparently drawn up by the notary whose name is attached to it, from a record in that court, but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that court, the *ratio decidendi* not being stated, although it is admissible in support of an allegation in a plea of justification that such a judgment has been pronounced. *Id.*

3. Where a plea of justification, under statute 6 and 7 Vict. c. 96, § 6, contains several charges, and the defendant fails to prove any of the matters alleged in such justification,

the jury must, of necessity, find a verdict for the crown, that is, that the defendant has not proved the whole plea. *Ib.*

4. Under the statute 6 and 7 Vict. c. 96, § 6, the court is bound to consider whether the guilt of the defendant, convicted by a jury, is aggravated or mitigated by the plea, and the evidence to prove or disprove the same, and to form its own conclusion upon the whole case. *Ib.*

5. Affidavits explaining the defendant's reasons for having placed certain allegations, injurious to the prosecutor, in his plea of justification, in support of which no evidence was given at the trial, are receivable in mitigation of punishment, but not as proving the truth of the charges made in them. *Ib.*

6. But where a document, purporting to have been an official record of the conviction of the prosecutor, before a foreign police court, was annexed to an affidavit, for the purpose of showing the *bona fides* of an allegation in the plea of justification, it was held inadmissible, as its admission would, in effect, put the prosecutor on his trial without his being able to make defence. *Ib.*

7. It is libellous to publish of one, in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under their consideration, upon a game of draughts. *The Commonwealth v. Wright*, 1 Cush. 46.

8. An indictment for a libel must not only contain, but it must also profess to set out, the very words of which the alleged libel is composed, that is to say, a transcript of the libellous publication, or of that part of it which is the subject of the indictment. *Ib.*

9. Marks of quotation, used in an indictment for a libel to distinguish the libellous matter, are not sufficient to indicate that the words thus designated are the very words of the alleged libel. *Ib.*

10. The words, "according to the purport and effect, and in substance," in an indictment for a libel, do not import that the very words are set out. *Ib.*

11. The word "tenor" imports an exact copy, and that it is set out in words and figures. *Ib.*

12. An indictment for a libel alleged that the defendant published, &c., an unlawful and malicious libel, according to the purport and effect, and in substance, as follows, the words between "libel" and "as follows" cannot be rejected as surplusage. *Ib.*

13. In an indictment for a libel, an allegation that the defendant sent the same to several specified persons, and thereby published the same, is a sufficient averment of publication. Such an allegation is not merely a conclusion of law. It is sustained by proof that the defendant sent the libel to one only of the persons specified. *The State v. Barnes*, 32 Maine, (2 Red.) 530.

14. An allegation that the defendant wrote and printed a libel, may be treated as an allegation that he wrote and printed a false and defamatory publication. *Ib.*

15. In an indictment for a libellous publication, it is not necessary to set out the residence and addition of the person libelled. *Ib.*

16. Where several mere modes of publication are mentioned, it is not fatal to the indictment that they are alleged in the disjunctive. *Ib.*

17. The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offence punishable by indictment. *The Commonwealth v. Chapman*, 13 Met. 68.

18. A publication that the prosecutor was charged and proven guilty, by the affidavits of some seven or eight of the most respectable gentlemen of the county, of both fraud and lying, is not justified by the production of affidavits used before an ecclesiastical tribunal, upon a charge preferred by the defendant against the prosecutor; and when so produced, it is competent for the prosecutor to inquire what was the decision of that tribunal. *Graves v. State*, 9 Ala. 447.

19. Evidence that the prosecutor, previous to the publication, had used violent, abusive and slanderous words concerning the defendant, which had been communicated to him about a month previous to the publication, is not admissible in mitigation of damages, it not appearing that the defendant's publication was provoked by or in any manner

connected with the previous slanderous words of the prosecutor. *Ib.*

20. Evidence of witnesses that the impression and conviction produced on their minds, by the evidence before the ecclesiastical tribunal, was different from its decision, or of the opinions expressed by others, as their decision and conviction upon the same evidence, or of the impression and belief in the community, whether the evidence established the charges, is inadmissible in mitigation of damages. The effect of such evidence is to put the opinions of others in the stead of the verdict of the jury upon the same evidence. *Ib.*

21. On an indictment for libel, the question of malice having been properly submitted to the jury, and they having found that there was malice, a new trial will not be granted, on the ground that the alleged libel was not malicious. *Taylor v. State of Georgia*, 4 Geo. 14.

22. An allegation that the defendant published a libel, "tending to blacken the honesty, virtue, integrity and reputation of the said A. B., and thereby to expose him to public hatred, ridicule and contempt, in which said false, scandalous, malicious and defamatory libel there were and are contained certain false, scandalous, malicious, defamatory and libellous matters, of and concerning the character, honesty, virtue, integrity and reputation of the said A. B.," is sufficient allegation that it was "of and concerning A. B." *Ib.*

23. An indictment, charging that the defendant did publish, &c., a certain libel, appearing as an advertisement in a newspaper, and setting forth the libel *in hæc verba*, signed by a third person, is sufficiently certain, without alleging that such libel was written by such third person. *Ib.*

24. On an indictment for libel, as a matter of practice, it is more regular that the libel should not be read to the jury until the defendant has cross-examined the witness who is called to prove the publication; but the fact that it is so read is not a sufficient ground for a new trial. *Ib.*

25. If an indictment for libel does not profess on its face to set forth an accurate copy of the alleged libel, in words and figures, it will be held insufficient, on demurrer or in arrest

of judgment. It is not sufficient to profess to set it forth according to its substance or effect. *State v. Brownlow*, 7 Humph. 63.

26. Where the indictment charged that the libel "contained, amongst other things, in substance, the following false, malicious and libellous matters and things, according to the tenor and effect following, that is to say," &c., it was held, that this averment professed to set forth the substance and not the words of the libel, and was, therefore, invalid. *Id.*

27. Each specification of libellous matters must allege the words published to have been of and concerning the prosecutor. *Id.*

28. Prosecutions for libels have always been regarded with jealousy, and the greatest strictness has been required in the pleadings. *Id.*

29. An indictment for a libel charged that the defendant set up, in public, a board on which a painting or picture of a human head, with a nail driven through the ear and a pair of shears hung on a nail, and the proof was, that a human head, showing a side face with an ear, a nail driven through the ear, and a pair of shears hung on the nail, was inscribed or cut in the board, by means of some instrument, but was not painted. Held, that there was a fatal variance between the allegation and the proof, and that the defendant must be acquitted. *The State v. Powers*, 12 Ired. 5.

30. An indictment for a libel charged the defendant with publishing of the plaintiff that he "was the most swindling and worthless speculator who ever brought ruin upon the city of St. Louis." On the issue of not guilty, the jury found a special verdict of "guilty of charging the plaintiff of being a visionary, worthless speculator." Held, that the verdict found matter not charged in the indictment, and was also bad in not finding malice. *Webber v. State*, 10 Mis. 4.

31. The indictment charged that the defendant "did write a certain false, malicious and defamatory libel, of and concerning the said E. K., which said false, malicious and defamatory libel is of the following purport and effect, that is to say," and then set out, within inverted commas, what,

by the evidence, was shown to be an exact copy of the libel. Verdict, guilty. On motion in arrest of judgment, it was held, that the indictment must, as a general rule, profess to set out the words of the libel, and that the indictment in this case was bad, because it did not profess to set out the libel *in hæc verba*. *The State v. Goodman*, 6 Rich. 387.

32. An indictment for a libel must set forth matter libellous on its face, of which the court is to judge, or matter not libellous on its face, and allege that it was intended by the prisoner to be so, in which case the question of intent is for the jury to determine. *State v. White*, 6 Ired. 418.

33. It is not libellous to write and publish of and concerning one who is a druggist:—"The above druggist in the city of Detroit, refusing to contribute his mite, with his fellow merchants, for watering Jefferson Avenue, I have concluded to water said avenue, in front of Pierre Feller's store, for the week ending June 27 1846." *The People v. Jerome*, 1 Mann. (Mich.) 142.

34. The editor of a newspaper was indicted for the publication of a libel, and, upon the trial, a witness was asked whether the editor, at the time of the publication, was not absent from town, and had no concern in the publication of the number containing the alleged libel. Held, that the question was proper, as going to the intent. *The Commonwealth v. Buckingham*, Thacher's Crim. Cas. 29.

35. Held, also, that it was proper to ask a witness whether, in his opinion, the alleged libellous words referred to the person alleged to be libelled. *Ib.*

36. On the trial of an indictment for publishing a libel in a newspaper, calculated to bring into ridicule the Russian consul, it was held irrelevant to ask a witness, on the ground that the consul, by writing criticisms, &c., for the newspapers, made himself a fair subject for such a satire as the publication complained of, whether "the Russian consul did not attend at the theatre some years ago, and assist and direct in getting up a ballet for public exhibition." *Ib.*

37. On such trial, it appeared that the person alleged to be libelled was described in the publication as "the representative of the Emperor of the Russias," and not as the

"Russian consul." Held, that evidence was admissible, in support of the averments in the indictment, to show that the publication applied to the Russian consul. *The Commonwealth v. Buckingham*, Thacher's Crim. Cas. 51.

38. On the trial of an indictment for a libel, which represented a person as having conducted disgracefully at a ball, it was held, that evidence of the circumstances which occurred at the ball, to rebut the allegation of malice in the indictment, was inadmissible. *Ib.*

39. In order to justify the publication of defamatory matter, the party must prove the truth of the matter alleged; and the justification must be as broad as the charge. It is not sufficient justification to show that part of the matter is true. *The State v. Burnham*, 9 N. H. 34.

40. If the defendant justifies by showing that there was a lawful occasion for the publication, and that the matter published is true, his motives in making the publication are immaterial. *Ib.*

41. If he cannot justify by showing the truth of the matter charged, he may excuse the publication by showing that it was made upon a lawful occasion, upon probable cause and from good motives. *Ib.*

42. If he publishes as a fact that which is not true, for the purpose of injuring the plaintiff, from actual malice, and not from a desire to attain a justifiable end, it is not sufficient excuse that he had probable grounds to believe the matter true. *Ib.*

43. If a person publish defamatory matter of another, without lawful occasion, but for the gratification of a spirit of detraction, or to bring the subject of it into contempt and disgrace, he cannot justify or excuse the publication; and an indictment may be sustained, whether the publications are true or false. *Ib.*

44. If the end to be attained is justifiable, as, if the object is the removal of an incompetent officer, or to prevent the election to office of an unsuitable person, or to give useful information to the community, or to those who have a right and ought to know, in order that they may act on such information, the occasion is lawful. *Ib.*

45. Where, however, there is merely a color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretence to publish and circulate defamatory matter, he is liable in the same manner as if no such pretence existed. *Ib.*

46. To justify a libel, it must be shown that the publication is true, and made from good motives. *Barthelemy v. The People*, 2 Hill, 248.

47. The editor of a newspaper has a right to publish the fact that an individual has been arrested, and upon what charge, but he has no right, while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. *Usher v. Severance*, 2 App. 9.

48. The English law of libel made part of the common law, and was used and practiced upon by the courts of Massachusetts, before the adoption of the constitution. *The Commonwealth v. Whitmarsh*, Thacher's Crim. Cas. 441.

49. The legislature and the Supreme Judicial Court of Massachusetts have repeatedly, since the adoption of the constitution, recognised libel as an indictable offence. *Ib.*

50. The 16th article of the bill of rights did not repeal the common law of libel as a criminal offence. *Ib.*

51. Where the editor of a sectarian paper publishes an obituary notice, in which it is stated that the deceased never used profane language, the intention of the notice being to promote certain religious views, it is the right of the editor of another sectarian paper, if he believes such notice to be injurious, to state in his newspaper that the deceased was a profane swearer, if such was the case, and if such statement is made simply to counteract what is believed to be the mischief of the notice. *The Commonwealth v. Batchelder*, Thacher's Crim. Cas. 191.

52. Malice, in the publisher of a libel, does not imply personal ill-will towards the person libelled. *The Commonwealth v. Bonner*, 9 Met. 410.

53. On the trial of an indictment for a libel, it is necessary to prove the averment or application of the libellous matter, where the meaning is not clear, and there is an introductory

statement and averments in the indictment, in order to justify the innuendoes, as well as to prove the publication and slanderous meaning. *The State v. Perrin*, 2 Brev. 474.

54. In the trial of an indictment for a newspaper libel, evidence of the admissions of the editor of the newspaper as to the authorship of the publication, made in the absence of the defendant, were held inadmissible, until a proper foundation by proof had been laid that the defendant was the author. *The Commonwealth v. Guild*, Thacher's Crim. Cas. 329.

55. The acknowledgment of the defendant is good evidence of the authorship of the libel. *Ib.*

56. In admitting evidence of the truth of a libel, the court is guided by the libellous publication, and not by the allegations in the indictment. *Ib.*

57. In the trial of an indictment for a libel, the publication set forth that one F. made certain statements of his own conduct while on a jury. Held, that evidence of his conduct while in the jury room, as well as of what occurred there generally, was inadmissible. *Ib.*

58. The indictment set forth a written libel "of and concerning the only daughter of Jane Roach." It was proved at the trial, that the libel concerned the daughter of Jane Roach, but not that she was the only daughter. Held, that it was not necessary, in order to show the application of the libellous writing, to prove that the prosecutrix was an only daughter. *The State v. Perrin*, 3 Brev. 152.

59. On the trial on an indictment for a newspaper libel, a conversation between the person libelled and the defendant, which gave rise to the libellous publication, printed in the same newspaper with the publication, and to which the publication referred, was allowed to be read by the counsel for the government, in opening the case. *The Commonwealth v. Snelling*, Thacher's Crim. Cas. 388.

60. Where, under the Massachusetts act of 1826, c. 107, Revised Statutes, c. 133, § 6, which allows the truth to be given in evidence in the trial of indictments for libel, the defendant, by order of the court, furnished a specification of the facts intended to be proved under the act, evidence of facts not specified was held to be inadmissible. *Ib.*

61. Upon the trial of an indictment for a newspaper libel, charging a justice of a court with official misconduct, letters addressed to him by his associate justices, offered in evidence to show their opinions in regard to the administration of justice in certain cases in such court, were held to be inadmissible. *Ib.*

62. Upon the trial of an indictment for a libel, which charges only official misconduct, no evidence of private misconduct can be introduced. *Ib.*

63. Payment by the defendant to the printer or publisher of a newspaper, for the insertion of libellous matter, is evidence to go to a jury of his authorship or adoption of the libel. *Schenck v. Schenck*, 1 Spencer, 208.

64. If a witness, who wrote the libel by the direction of the defendant, does not ask the protection of the court, but submits to answer the questions put to him, his testimony is admissible, and will be received. *Ib.*

65. If a defendant, after action brought, issues a new publication, mingling the matter for which he has been sued with new libellous matter, he cannot call upon the court to analyze the publication, and separate what refers to the former libel from the new slanderous matters it may contain; but the whole may be read in evidence. *Ib.*

66. In an indictment for a libel, evidence that the object of the defendant in publishing the alleged libel was to attack vicious persons and establishments injurious to public morals, was held inadmissible to rebut the presumption of malice. *Commonwealth v. Snelling*, 15 Pick. 337.

67. Under the Massachusetts statute of 1826, in an indictment for libel, where no evidence of the truth of the charges was produced by the defendant, it was held, that he could not show in evidence that the charges were communicated to him by so respectable a person that he did not doubt their truth; and held, also, that he could not show the general bad character of the persons charged. *Ib.*

68. In South Carolina, the truth of a libel cannot be given in evidence in a criminal prosecution. *State v. Lehre*, 2 Const. R. Appendix, 809.

69. The truth of a libel, when it does not negative the in-

tention to defame the reputation of another, cannot be shown in defence. *Commonwealth v. Clapp*, 4 Mass. 163; *Commonwealth v. Blanding*, 3 Pick. 304.

70. But as it may be shown that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame, so there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, where such evidence will tend to negative the malice and intent to defame. *Commonwealth v. Clapp*, 4 Mass. 163.

71. Thus, of a complaint made to the executive or legislature, or any other public constituted body, against any of its officers or agents, for the purpose of obtaining their removal, or the redress of a grievance, the subject of the complaint being of a public nature, or the complainant having a particular interest in it. *Id.*

72. So of a publication relating to a candidate for a public office, or the incumbent of an elective public office. *Commonwealth v. Clapp*, 4 Mass. 163, 169.

73. So of proceedings in legislative assemblies and courts of justice. *Commonwealth v. Blanding*, 3 Pick. 304, 314.

74. So of cases of private import, where information is given to parties having an interest in, and who have a right to act upon it. *Commonwealth v. Blanding*, 3 Pick. 317.

75. It is the province of the court to decide whether the case is a proper one for the admission of the truth, in evidence. *Commonwealth v. Blanding*, 3 Pick. 304.

76. It was held not to be such a case where the defendant caused to be published of the prosecutor, an innholder, an account of a person's dying of drunkenness at his inn, and charging the prosecutor with having administered to him the "liquid poison" which caused his death, and warning the public against the house, and invoking the municipal authorities to take away his license. *Id.*

77. Such a publication, being on its face libellous, and not within the principle permitting the truth to be shown, will be presumed to have been published with malicious intent. *Id.*

78. Where the libel complained of is in a petition to the legislature, the truth may be given in evidence, in justifica-

tion. It is not necessary to plead the truth. *Commonwealth v. Morris*, 1 Virg. Cas. 176.

79. Where, in an action for libel, the defendant pleaded not guilty and a justification, the admission of the libel in the latter plea does not estop the defendant to insist on his denial, nor is it evidence to prove the publication on the issue joined on the former plea. *Whitaker v. Freeman*, 1 Dev. 271.

80. Under the Massachusetts Revised Statutes, c. 133, § 6, which permit a defendant, who is indicted for a libel, to give in evidence the truth of the matter charged as libellous, but provide that such evidence shall not be deemed a justification, unless it be made to appear that such matter was published with good motives and for justifiable ends, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends. *The Commonwealth v. Bonner*, 9 Met. 410.

81. The transmission of a sealed letter, by mail, containing libellous matter, is indictable. *Hodges v. The State*, 5 Humph. 112.

82. The indictment must charge that it was sent with the intention of provoking a breach of the peace. *Ib.*

83. Where a publication is malicious, and its obvious design and tendency is to bring the subject of it into contempt and ridicule, it will be a libel, although it imputes no crime liable to be punished with infamy. *The State v. Henderson*, 1 Rich. 179.

84. Where a painter, to revenge himself on one whose likeness he had taken, for disapproving of the execution, painted the ears of an ass to it, and exposed it to sale at auction, it was held indictable as a libel. *Mazzara's Case*, 2 Rogers' Rec. 113.

85. If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant. *R. v. Lovett*, 9 C. & P. 462.

86. It is decided that the publication of preliminary or *ex parte* proceedings in a court of justice cannot be justified as the publication of depositions before a justice of the peace on a charge of murder. *Lee's Case*, 5 Esp. 123.

87. Where, on showing cause against a rule for a criminal information for publishing a blasphemous and seditious libel, it was urged that it was merely the report of a judicial proceeding, yet the court held, that if the statement contained any thing blasphemous, seditious, indecent or defamatory, the defendant had no right to publish it, though it had actually taken place in a court of justice. *Carlisle's Case*, 3 B. & A. 167.

88. Where a libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates, PARTESON, J., held, that on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of showing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was, in fact, a riot, and that a pistol was fired at the people. *Brigstock's Case*, 6 C. & P. 184.

89. A person who derives profit from, and who furnishes the means of carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether. *Gutch's Case*, Moo. & M. 443.

90. When the publication is *prima facie* excusable, on account of the cause of writing it, as in the case of servants' characters, or confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved. *Bromage v. Prosser*, 4 B. & C. 256; *M'Pherson v. Daniels*, 10 B. & C. 272.

91. Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter or prove express malice. *Wright v. Woodgate*, Tyr. & G. 15.

92. Where the malicious intent of the defendant is, by averment in the indictment, pointed to a particular individual, or to a particular act or offence, the averment must be proved as laid. Thus, where the indictment alleged a publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney, it was held, that proof of a publication to the prosecutor only did not maintain the indictment, and that the intent ought to have been averred, to provoke the prosecutor to a breach of the peace. *R. v. Wegener*, 1 Stark. N. P. 245.

93. Where a man publishes a writing, which, upon the face of it, is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary, on the part of the prosecution, to give evidence of any circumstance from which malice may be inferred. Thus, in *Harvey's Case*, it was said by Lord TENTERDEN, that a person who publishes what is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. *Harvey's Case*, 2 B. & C. 257.

94. Where the libel is published by an agent of the defendant, the authority of such agent must be strictly proven. In the case of booksellers and publishers, proof that the party actually vending the libel was a servant in the way of their business, is sufficient, for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where it appeared that the libel in question was in the handwriting of the defendant's daughter, who was usually employed by him to write his letters of business, but there was no evidence that the defendant had authorized her to write this particular document, it was held to be no evidence of publication as against him. *Harding v. Greening*, 1 B. Moore, 477.

95. A letter containing a libel was proved to be in the

handwriting of A., to have been addressed to a party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded to London to be forwarded to Scotland. It was produced at the trial with the proper post-mark, and with the seal broken. This was held to be sufficient evidence of the letter having reached the person to whom it was addressed, and of its having been published to him. *Warren v. Warren*, 1 C. M. & R. 250.

Malicious Mischief.

1. Malicious mischief consists in the willful destruction of personal property, from actual ill-will or resentment towards its owner or possessor. *The State v. Robinson*, 3 Dev. & Bat. 130.

2. An indictment for "unlawfully, wickedly and maliciously" cutting and destroying a quantity of standing Indian corn, cannot be supported. *The State v. Helmes*, 5 Ired. 364.

3. An indictment for malicious mischief will only lie for the malicious destruction of personal property; and growing corn, except in a few cases, is regarded as part of the realty. *Ib.*

4. On an indictment, under the Revised Statutes of Massachusetts, c. 126, § 39, charging that the defendant willfully destroyed and injured a cable to which a lobster car was moored and fastened, proof that he cut the cable a few feet from one end, so as to let the car float off, was held sufficient to warrant his conviction. *The Commonwealth v. Soule*, 2 Met. 21.

5. In an indictment for malicious mischief, it is not necessary to aver that the injury was done "with force and arms." *Taylor v. State*, 6 Humph. 285.

6. In a criminal prosecution, under the Revised Statutes of Maine, c. 162, § 13, for willfully destroying the property of a person without his consent, it is immaterial whether the property came rightfully or wrongfully into the possession of the defendant. *The State v. Pike*, 33 Maine, (3 Red.) 361.

7. An information charged that the defendant did knowingly and willfully, without lawful authority, cut down and carry off a lime-tree between his land and the land of a certain J. H., contrary to the form of the statute. Held, that the offence was not so charged as to be punishable by any law in force in Virginia. *Powell's Case*, 8 Leigh, 719.

8. Shaving the mane and cropping the hair from the tail of a mare, in the owner's stable, does not constitute the offence of "disfiguring," created by act of assembly, 1789, South Carolina. *The State v. Smith*, Cheves, 157.

9. The unlawful and malicious killing of a cow is indictable as malicious mischief, under the Tennessee act of 1803, c. 9, § 2. *Ib.*

10. If the indictment charge the unlawful and malicious killing of a cow, it is good, without the use of the word "beast;" a cow being a beast within the meaning of the statute. *Ib.*

11. What is meant in law by the term "malice." *State v. Doig*, 2 Rich. 179.

12. On an indictment under the North Carolina act, (Revised Statutes, c. 34, § 55,) in relation to the altering or defacing the marks of cattle, &c., if the act of altering or defacing, &c., is proved to have been willfully done, it necessarily follows that the intent was to defraud or injure the owner, unless there be proof to the contrary. *The State v. Davis*, 2 Ired. 153.

13. It is no objection to a conviction on an indictment for this offence, that the cattle, beast, &c., had, at the time the act was done, strayed from its owner. *Ib.*

14. "Malice," in the Alabama statute against maliciously killing certain animals, means malice against the owner of the animal, and an indictment cannot be sustained under it against a person killing one of the animals specified, which has no known owner. *The State v. Pierce*, 7 Ala. 728.

15. An indictment for malicious trespass alleged that the defendant did "maliciously and mischievously injure and cause to be injured a certain house, the property of one A., situate," &c., "of the value of \$50, to the damage of the said A. \$5, contrary to the form of the statute," &c. Held, that the

offence was insufficiently described, and that the indictment should have shown the specific injury done to the house. *State v. Aydelott*, 7 Blackf. 157.

16. An indictment charging that the defendant maliciously destroyed divers windows of the county seminary building, the property of the county of Sullivan, sufficiently charges a malicious injury to public property, under the Revised Statutes of Indiana, p. 975, c. 53, § 71, and charges the offence with sufficient certainty. *Read v. The State*, 1 Carter, (Ind.) 511.

17. In Alabama, an indictment for malicious mischief should allege the value of the property injured. *The State v. Garner*, 8 Port. 447.

18. A party is not guilty of malicious mischief, under the act of 1803, c. 9, in Tennessee, for throwing down the fences of another, unlawfully and without right, under the impression that he had legal right to do so. *Goforth v. State*, 8 Humph. 37.

19. The malicious killing of a dog is an indictable offence under the statutes of Indiana, (Revised Statutes, p. 975, § 71,) on the subject of malicious mischief. *The State v. Sumner*, 2 Carter, (Ind.) 377.

20. To constitute the offence of malicious mischief under the act of Tennessee of 1803, c. 9, malice against the owner, and not towards the animal, is required. *The State v. Wilcox*, 3 Yerg. 278.

21. The offence of cutting and girdling fruit trees is not punishable by indictment at common law, but only by statute of Maine of 1821, c. 33. *Brown's Case*, 3 Greenleaf, 177.

22. In a civil action, under the Revised Statutes of Maine, (c. 162, § 13,) for willfully destroying property, the jury were instructed to decide upon the balance of testimony as in other civil cases; and that the defendant was not entitled to a verdict, upon raising merely a reasonable doubt, as would be the case in a criminal prosecution. Held, that the instructions were erroneous. [WELLS, J., dissenting.] *Thayer v. Boyle*, 30 Maine, (17 Shep.) 475.

23. An indictment for malicious mischief will only lie for

a malicious destruction of personal property. *State v. Holmes*, 5 Ired. 364.

24. An indictment for malicious mischief will not necessarily be defeated, merely because the acts proved might have supported a charge for larceny. *The State v. Leavitt*, 32 Maine, (2 Red.) 183.

25. The statute of 9th Geo. I., in relation to malicious shooting, commonly called the "Black Act," has never been in force in Georgia, and an indictment under it will be quashed in that state. *State v. Campbell*, Charlt. 166.

26. On the trial of an indictment for maliciously secreting a book of town records, proof that the book was previously left with the defendant, with the knowledge of some of the principal inhabitants of the town, is no defence. *The State v. Williams*, 30 Maine, (17 Shep.) 484.

27. In order to a conviction of the offence of malicious mischief, the jury must be satisfied that the injury was done either out of a spirit of wanton cruelty or of wicked revenge. *The Commonwealth v. Walden*, 3 Cush. 558.

28. An indictment for malicious mischief must either expressly charge malice against the owner, or otherwise fully describe the offence. It is not sufficient to set forth that the act was done "feloniously, willfully and maliciously," without averring that it was done "mischievously," or with malice against the owner. *The State v. Jackson*, 12 Ired. 329.

29. On the trial of an indictment for malicious mischief, under the fifth section of the fourth article of the penal Code, the person whose property is injured, is not a competent witness for the state. *Blackstone v. The State*, 15 Ala. 415.

Mayhem.

1. In an indictment under the 48th section of the South Carolina act, c. 34 of Revised Statutes, an intent to disfigure is, *prima facie*, to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. *The*

State v. Gerkin, 1 Ired. 121; *The State v. Crawford*, 2 Dev. 425.

2. It is not necessary, in an indictment under the statute, to prove malice aforethought, or a preconceived intention to commit the maim. *Ib.*

3. It is not necessary, to constitute the offence by biting off an ear, that the whole ear should be bitten off; it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *Ib.*

4. In an indictment for biting off an ear, under the Revised Statutes, c. 34, § 48, of North Carolina, it need not be alleged whether it was the right or left ear. *State v. Green*, 7 Ired. 39.

5. Although the Virginia statute against mayhem affixes a penalty when the act is done with intent to maim, disfigure, disable or kill, (in the disjunctive,) yet the intents may be properly laid conjunctively; and although all the intents are laid, proof of either supports the indictment. *Angel v. Commonwealth*, 2 Virg. Cas. 231.

6. The putting out an eye is a maim at common law, and an indictment, under the 55th section of the Tennessee Penal Code, for putting out an eye, must aver that the party was thereby "maimed." *Chick v. State*, 7 Humph. 161.

7. An intentional and unnecessary mutilation, by a slave, of any of the members of a white person, enumerated in the statute of Alabama as constituting mayhem, will be "willfully" committed, within the meaning of the act. But, if the slave be engaged in mortal strife, his adversary armed with a deadly weapon, and he defenceless, such a mutilation will not be considered as "willfully" done, unless, from the circumstances of the case, it can be considered as having been wantonly done. *State v. Abram*, 10 Ala. 928.

8. By disabling a limb or member, the Alabama statute of 1807, (Aik. Dig. 102,) contemplates a permanent injury such as would constitute mayhem at common law. The temporary disabling of a finger, an arm or an eye, is not sufficient to constitute the offence. *The State v. Briley*, 8 Port. 472.

9. The offence may be committed without an entire muti-

lation of a member; but the biting off a small portion of the ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention is directed to it, is not mayhem under the statute of Alabama. *State v. Abram*, 10 Ala. 928.

10. Where a principal, charged with the offence of mayhem, has been found guilty, a person charged as accessory may be found guilty of the beating only, the probable consequences of his acts extending no further. *State v. Absence*, 4 Port. 397.

11. Where an eye was put out in a sudden conflict, it is not necessary, to support an indictment for mayhem, that it should appear that the defendant premeditated the act; it is sufficient if it appear to have been done maliciously and on purpose, from a design formed during the conflict. *The State v. Simmons*, 3 Ala. 497.

12. Under the statute of Arkansas, depriving a person of the use of a limb, or rendering him permanently lame or defective in bodily vigor, is maiming, by whatever instrument or means it is done; as by shooting. *Baker v. The State*, 4 Pike, 56.

13. It is sufficient if his bodily vigor is affected by his strength, activity or the like, being decreased. *Ib.*

14. And if it be proved that the person was made lame, it will be presumed that the lameness was permanent, in the absence of evidence to the contrary. *Ib.*

15. *Son assault demesne* is a good defence to an indictment for mayhem, but the defence can only be sustained by proof that the resistance was in proportion to the injury offered. *Hayden v. The State*, 4 Blackf. 546.

Perjury.

1. Where the indictment charged that the perjury was committed on the defendant's offer to become bail for one Thompson, committed on McDonald's complaint, in default of bail for \$500, and the evidence showed the perjury to have been committed on defendant's examination as bail for

Thompson, committed on the complaint of Sayre and others, in default of \$3,000 bail; it was also held to be a material variance, and that the proof did not support the indictment. *Smith v. The People*, Parker's Cr. 317.

2. A variance between an indictment for perjury on a trial before a referee and the evidence, in regard to the person before whom the referee was sworn, is immaterial. The allegations and proof as to the taking of an oath by the referee are superfluous; he acquired jurisdiction by the order of reference duly made. *The People v. McGinnis*, Parker's Cr. 387.

3. In North Carolina there is but one statute punishing the crime of perjury; an indictment for that offence, therefore, properly concludes against the statute. *State v. Hoyle*, 6 Ired. 1.

4. Since the statute of 1842, it is not necessary to set forth, in an indictment for perjury, the pleadings in the case in which the perjury is alleged to have been committed. *Ib.*

5. And where such case was tried at a special term of the Superior Court, it is not necessary to report the order of the judge directing such special term to be held, nor the governor's appointment of the particular judge holding it. *State v. Ledford*, 6 Ired. 5.

6. Nor need these facts be proved on the trial. *Ib.*

7. A bankrupt, who submits the facts in regard to his property fairly to the advice of his counsel, and, acting under the advice thus given, withholds certain items from his schedule, is not guilty of perjury, the fraudulent intent being wanting. *United States v. Conner*, 3 M'Lean, 573.

8. On an indictment for perjury in swearing falsely to a deposition, the deponent having afterwards testified on the stand that the facts stated therein were not true, the prisoner is not estopped from showing, in his defence, the truth of the facts stated in the deposition. *State v. J. B.* 1 Tyler, 269.

9. The record of the court, at which perjury is charged to have been committed, is not excluded in consequence of the day of holding being misrecited in the indictment; especially if under a *videlicet*. *State v. Clark*, 2 Tyler, 282.

10. In an indictment for perjury, under the bankrupt law,

in not giving a full and true account of the property of the petitioner, the items on the schedule need not be stated in the indictment. The allegation that the property was omitted, with intent to defraud A. and the other creditors, is sufficient. *United States v. Chapman*, 3 M'Lean, 390.

11. A party to a suit is not disqualified as a witness to prove perjury therein, if a conviction would not entitle him to a new trial, or to damages as a party injured. *State v. Bishop*, 1 Chip. 120.

12. In cases of perjury, two witnesses are required, as well to prove the facts sworn to as the falseness of the oath. *State v. Howard*, 4 M'Cord, 159.

13. If an indictment for perjury show that the testimony alleged to be false was material to the issue, an express allegation that it was material is unnecessary. *State v. Hall*, 7 Blackf. 25; *State v. Johnson*, 7 Blackf. 49.

14. Where an indictment for perjury alleged the perjury to have been committed on a trial before a justice and a jury of six men, and the trial seemed to have been with consent of parties, it was held, that such consent was a waiver of the irregularity as to the number of the jury. *Id.*

15. It is perjury to swear falsely to a material point in an affidavit for the continuance of a cause. *State v. Johnson*, 7 Blackf. 49.

16. One witness can prove the taking of the oath; but one witness, without supporting circumstances, cannot prove the falsity of the oath. *State v. Hayward*, 1 N. & M. 546.

17. Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness, not in swearing rashly and inconsiderately, according to his belief. *United States v. Shellnure*, 1 Bald. 370.

18. On a trial for perjury, the testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment. *Commonwealth v. Pollard*, 12 Met. 225.

19. Where a party is indicted for perjury, in giving testimony on the trial of an issue in court, proof that his testimony was admitted on that trial, is not sufficient to warrant a jury, upon the trial of the indictment, to infer that such testimony was material to the issue. *Id.*

20. An indictment for perjury, committed in taking an oath before the clerk of a court, must show that the oath was one which the clerk is authorized to administer, and a general averment that the clerk had competent power to administer the oath is insufficient. *McGregor v. The State*, 1 Carter, (Ind.) 232.

21. G. F. F., being summoned as the trustee of L. P., stated in his answer, among other things, that, from the proceeds of property placed in his hands by L. P., as security for the indebtedness of S. P., he had received a sum of money, which, in pursuance of a previous agreement between him and S. P., he had appropriated in part discharge of his demands against S. P., and that he had appropriated, paid over or accounted to S. P. for all the money so received by him. The supposed trustee being discharged as such, S. P. entered a complaint against him before the grand jury for perjury in the above statement contained in his answer. On the investigation of this complaint, S. P. appeared and was examined as a witness, and, after having given a statement in detail of the transactions between him and G. F. F., testified, in answer to a question put to him by the district attorney, that there never was any contract or agreement between him and G. F. F. for the payment by him to the latter of any more than lawful interest on any of the transactions in evidence between them, in any shape or in any form. S. P. being indicted for perjury in thus testifying, it was held, that the evidence given by him was material to the inquiry before the grand jury. *The Commonwealth v. Parker*, 2 Cush. 212.

22. One summoned as trustee may discharge himself, by disclosing that he has appropriated the funds of the principal defendant, in his hands, to the payment of money due him by such defendant, though the same be in fact due on a contract which is usurious; and, therefore, if a supposed trustee, having discharged himself by a statement of such appropriation, in his answer, without disclosing that the debt was due him on an usurious contract, is indicted for perjury in such statement, and the principal defendant being examined as a witness in support of the charge, deny the existence of any con-

tract between him and the supposed trustee, for the payment by him to the latter of any more than lawful interest, such testimony, if false, may be the subject of an indictment for perjury. *Ib.*

23. In order to authorize a conviction of perjury, it is necessary, in addition to the testimony of one witness to the falsity of the statement alleged as the perjury, that strong corroborating circumstances, of such a character as clearly to turn the scale and overcome the oath of the party charged, and the legal presumption of his innocence should be established by independent evidence; and, therefore, where the charge in an indictment for perjury was, that the defendant had testified that no agreement for the payment by him of more than the lawful rate of interest had ever been made between him and a person to whom he was indebted, upon certain contracts, it was held, that the testimony of the creditor to the existence of such an agreement, corroborated by the letters of the defendant to him, containing a direct promise to pay more than legal interest on a demand then held by such creditor, if the payment could be delayed, and apologizing for a delay which had already taken place in the payment of another demand, and promising to pay a *bonus* for the delay, was competent and sufficient evidence of the falsity of the statement alleged as the perjury. *Ib.*

24. In an indictment for perjury, which charges the defendant with taking a false oath to procure his discharge from custody, under a writ of *ca. sa.*, an assignment which alleges that at the time when he took the oath he had moneys whereby to satisfy the debt for which he was arrested, is sufficient. *Debernies v. The State*, 19 Ala. 23.

25. An indictment for perjury is not vitiated because some of the assignments are bad, and proof of any one assignment that is good is sufficient. *Ib.*

26. Where, in an indictment for perjury, it appeared that the defence set up to a criminal complaint amounted to an *alibi*; that the testimony of a particular witness who was examined thereon, and whose evidence was alleged to be false, tended to establish this defence; and it was averred, that each and every part of the testimony became and was mate-

rial to the defence; it was held, that the materiality of the alleged false testimony was sufficiently stated in the indictment. *The Commonwealth v. Flynn*, 3 Cush. 525.

27. An indictment charging perjury in having falsely sworn that the sum of \$20 was unlawfully received as interest for the loan of \$400, is not sustained by proof that the sum lent was \$380, and a note given for \$400 and interest. *The State v. Tappan*, 1 Foster, (N. H.) 56.

28. To convict of perjury, under the act of 1st of March, 1823, in making false entries at the custom-house in regard to the cost of imported goods, documentary evidence and the correspondence of the accused are sufficient, without living witnesses; and such evidence is the best. *United States v. Wood*, 14 Peters, 430.

29. Where, in a prosecution for perjury, a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury, as set forth in the indictment, such paper is proper evidence at the trial. *Osburn v. State*, 7 Ham. 212.

30. An indictment for perjury must show that the testimony which the accused gave was material; therefore, if it does not clearly show that the testimony given before a grand jury related to an offence committed within the county, the indictment is defective. *Pickering's Case*, 8 Gratt. 628.

31. In a prosecution for perjury, all the facts necessary to show the materiality of the alleged false testimony must appear upon the face of the indictment. *The People v. Collier*, 1 Mann. (Mich.) 137.

32. In an indictment for perjury, an allegation that "it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to," and stating what the accused swore to, is insufficient. *Ib.*

33. Where, on an indictment for perjury, committed in swearing to an answer in chancery, the attorney who drew the bill testified that it was "his belief" that the bill called for an answer on oath, it was held, that his testimony was not sufficient to establish the fact, and, without further proof of the fact, the defendant could not be convicted. *Silver v. State*, 17 Ohio, 365.

34. Perjury may be committed in swearing that the deponent's account, sued upon, is just and true, and that, to the best of his knowledge and belief, no part has been paid. *Patrick v. Smoke*, 3 Strobb. 147.

35. In a suit before a magistrate, in South Carolina, in case a witness is not, or cannot be produced to prove the demand, the magistrate may examine either party, such oath being first proposed to the defendant, and upon his refusal to take it, then to the plaintiff; and if the plaintiff swear falsely to a material point thereupon, he is guilty of perjury. *Ib.*

36. Where a party offers^{*} himself to prove his books, and willfully testifies untruly as to matters material to the issue, it is perjury, although he was sworn generally, but without objection, to tell the whole truth, instead of being sworn to make true answers. *State v. Keene*, 26 Maine, (13 Shep.) 33.

37. So, where such oath is administered and such testimony given on a trial before referees. *Ib.*

38. Where the indictment for perjury, in such case, alleged that the false testimony was as to whether the books testified to were witness' books of original entries, and whether the account had not been settled on his book of original entries, it was held to be no objection that the items of the account to which the testimony related were not specified. *Ib.*

39. It is not perjury for a bankrupt, under the bankrupt law of 1841, to swear falsely to his schedule. *United States v. Dickey*, 1 Morris, 412.

40. But if he makes false statements in regard to it, in answer to interrogatories proposed to him in his examination, it is perjury. *Ib.*

^{*}41. An indictment against a person summoned as a juror, for having falsely sworn as to his having formed or expressed an opinion as to the guilt or innocence of a person on trial, must state that it became material to ascertain whether the juror had formed and expressed an opinion of the guilt or innocence of the defendant, and that an issue as to the qualifications of the jurors generally, or of the juror in particular, had been made by the parties, and submitted to the court. *State v. Moffat*, 7 Humph. 250.

42. Where it appears, in an indictment for perjury, that the defendant gave the alleged false testimony on an oath taken before a justice of the peace, in a matter of which the justice had not jurisdiction, the indictment will be held bad on demurrer, and will be quashed. *State v. Furlong*, 26 Maine, (13 Shep.) 69.

43. On an indictment for perjury, the defendant may show that the person who administered the oath alleged to be false had no authority to administer it. *Muir v. The State*, 8 Blackf. 154.

44. Upon the trial of an action of ejectment, the title of the lessor of the plaintiff depended upon the fact that A. survived B. The will of B. was irrelevant to the title, but proof of the probate was relevant with reference to the time of B.'s death. A copy of the will of B. was tendered in evidence, and, on objection being made, the plaintiff's attorney falsely swore that he had examined the copy with the original, in the registry at Llandaff; and, upon further objection that the probate ought to be produced, or the act-book proved, he further falsely swore that he had examined the memorandum at the foot of the copy with the entry in the act-book. The judge then offered to receive the document, but the counsel withdrew it. The memorandum was, in fact, a copy of an entry in a book called "The Act-Book," but not a copy of the act of probate, so that the evidence, if true, would not have rendered the document legally admissible. Held, nevertheless, that the attorney had sworn falsely in a judicial proceeding upon a material point, and was guilty of perjury. *Regina v. Philpotts*, 8 Eng. Law and Eq. Rep. 580.

45. Under the act of Congress of March 3, 1825, an intentional omission, by one applying for the benefit of the bankrupt law, to place any portion of his property upon a schedule, sworn to by him as containing a true account of all his effects, is perjury. *The United States v. Nichols*, 4 M'Lean, 23.

46. An indictment for perjury, stating that the defendant came before A., a justice, &c., and then, &c., was sworn before said A., being such justice, &c., shows with sufficient

certainly by whom the oath was administered. *The State v. Ellison*, 8 Blackf. 225.

47. On the trial of an indictment for perjury at central criminal court, to prove the fact of a former trial in the same court, it was held, that the production, by the officer of the court, of the caption, the indictment, with the endorsement of the prisoner's plea, the verdict and the sentence of the court upon it, together with the minutes of the trial made by the officer in court, was sufficient evidence of it; and that the production of neither the record nor a certificate under the 14 and 15 Vict. c. 99, §§ 13 and 14, and 15 Vict. c. 100, § 22, was necessary. *Regina v. Newman*, 9 Eng. Law and Eq. Rep. 529.

48. A. conveyed an estate to B., which had been previously mortgaged to C., and a judgment was recovered by C., under the mortgage, for the possession of the estate, and a petition for a review was afterwards filed by B., setting forth the discovery of new evidence, showing a technical payment of the debt secured by the mortgage, and A. testified, at the hearing of the petition, that he notified B., at the time of such conveyance, of the existence of the mortgage. A. was afterwards indicted for perjury in so doing, and a motion was made, before plea, to quash the indictment, by reason of the immateriality of such evidence to the main issue at the hearing. Held, that such evidence was pertinent, if not material, and the motion was denied. *The Commonwealth v. Farley*, Thacher's Crim Cas. 654.

49. The record of the proceedings at the hearing, offered in evidence at the trial, set forth that the petition was for a review of a judgment "for the possession of the petitioner's mill site and mills," whereas the indictment alleged that the judgment was "for possession of the land, mill site and mills of B." The record also set forth that the petition was "for a review of a certain action and *supersedeas*, and stay of execution," but the indictment alleged that the petition was "for a review of a certain action and judgment." Held, that, as the indictment did not recite the record, such variances were no ground for the rejection of the testimony. *Id.*

50. Held, also, that although the indictment alleged that

the hearing was on the 3d day of April, before three of the justices of the Supreme Judicial Court, when the record set forth that it was on the 10th day of April, before the Supreme Judicial Court, the record was admissible. *The Commonwealth v. Farley*, Thatcher's Crim. Cas. 654.

51. Held, also, that any of the proceedings set forth in said indictment, as having occurred at said hearing, and not set forth in the record, might be proved *aliunde*. *Id.*

52. Held, also, that where the indictment set forth that the parties were "at issue" at the hearing, no issue having been there joined, the words were to be taken in their popular signification. *Id.*

53. Where perjury was assigned upon a statement made by the prisoner on oath, upon a trial at *nisi prius*, that in June, 1851, he owed no more than one quarter's rent to his landlord, and the prosecutor swore that the prisoner owed five quarter's rent at that date, and to corroborate the prosecutor's evidence, a witness was called, who proved, that in August, 1850, the prisoner had admitted to him that he then owed his landlord three or four quarter's rent, it was held, that this was not such corroboration as was necessary to sustain an indictment for perjury, and that two witnesses were not essentially necessary to contradict the oath on which the perjury is assigned, but that there must be something more than the oath of one, to show that one party is more to be believed than the other. *Regina v. Boulter*, 9 Eng. Law and Eq. Rep. 537.

54. In an indictment for perjury, committed by a petitioner in bankruptcy, it is unnecessary to set forth the petition substantially, or otherwise; such a reference to it as will show its character and object is sufficient. *The United States v. Dening*, 4 M'Lean, 3.

55. Where the court has jurisdiction of the subject matter of inquiry, it is not necessary that the proceedings should be strictly regular, in order to convict a witness in the case of perjury. *State v. Lavalley*, 9 Mis. 834.

56. If one offered as surety in a recognizance swears falsely in his examination as such, it is perjury. *Id.*

57. To constitute perjury it is not necessary that the evi-

dence given should be material to the main issue ; it is sufficient if it be material to any proper matter of inquiry. *Ib.*

58. An oath administered by the clerk of a court, not required by law or by order of court, is extra-judicial, and, if false, lays no foundation for an indictment for perjury. *The United States v. Babcock*, 4 M'Lean, 113.

59. On a trial for perjury, charged to have been committed before a court-martial, it is not necessary to produce the commission of the captain, but parol proof of his acting as such is sufficient. *The State v. Gregory*, 2 Murph. 69.

60. An indictment for perjury should specify in what the perjury consisted, and it is not sufficient to allege that the defendant swore falsely in respect to his schedule, in taking the oath of bankruptcy. *United States v. Morgan*, 1 Morris, 341.

61. Where a defendant, by a subsequent deposition, expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that such former one was intentionally false at the time it was made, or in such subsequent deposition testifies to such other facts and circumstances as to render the corrupt motive apparent, and negative the probability of mistake, in regard to the first, he may be properly convicted upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. *The People v. Burden*, 9 Barb. Sup. Ct. 467.

62. In a charge of forswearing, unless it appear from the accompanying words that a judicial forswearing was meant, the plaintiff must show upon the record that the defendant alluded to some particular forswearing, which amounted to perjury. *Browne v. Dula*, 3 Murph. 574.

63. An indictment for perjury, alleging that the respondent was sworn, and took her corporal oath to speak the truth, the whole truth, &c., was holden to be sustained by evidence of the oath taken in the usual form. *The State v. Norris*, 9 N. H. 96.

64. An indictment for perjury cannot be maintained where the supposed perjury depends upon the construction of a deed. *The State v. Woolverton*, 8 Blackf. 452.

65. On an indictment for perjury, in swearing that A., one of the several assailants in an affray, struck the defendant, when it appeared that A. did not, but another assailant did strike the blow, it was held to be competent for the defendant, in order to disprove a corrupt motive, to show that, immediately on his recovery from the unconsciousness occasioned by the blow, he had given the same account of the transaction which he did in his testimony before the court on the trial of the case in which the perjury was charged. *The State v. Curtis*, 12 Ired. 270.

66. The direct oath of one witness, and the declarations of the prisoner, inconsistent with the oath in which perjury is assigned, is sufficient to convict. *The State v. Molier*, 1 Dev. 263.

67. An indictment for perjury, in taking an oath administered by a clerk of court, must show that the oath was such as the clerk was authorized to administer. *McGragor v. The State*, 1 Smith, 179.

68. If it is intended to convict a party of perjury in falsely swearing to an affidavit, the indictment must sufficiently charge the fact that the affidavit was made by the accused, otherwise it cannot be introduced as evidence. *Copeland v. The State*, 23 Miss. (1 Cush.) 257.

69. Where the charge in an indictment for perjury is, that the party accused was sworn as a witness in his own case, and while thus testifying, committed the perjury set forth in the indictment, it was held, that an affidavit made by the accused was not evidence which could be introduced on the trial of the issue, except by consent of parties. *Ib.*

70. An indictment for perjury, which sets forth that a warrant was tried, in which A. demanded of B. \$20 for corn, &c., is sufficiently proved by producing a warrant between the same parties for a debt due by account, without specifying the particulars of the account. *The State v. Alexander*, 2 Dev. 470.

71. An indictment against a deponent for perjury, committed in giving a deposition taken *in perpetuam*, concluded with the following words: "As by his answers to said interrogatories written in said deposition remaining, will, among

other things, appear." Held, that upon the rejection of the deposition, parol evidence was inadmissible to prove the testimony of the deponent. *The Commonwealth v. Stone*, Thacher's Crim. Cas. 604.

72. In an indictment for perjury, committed before a justice of the peace, it is sufficient to aver, in relation to jurisdiction, that it was at a justice's court, held at the proper time and place, on an issue duly joined in his court, in a cause which came on to be tried in due form of law, and that the justice had sufficient authority to administer an oath, without alleging that the case in which the perjury is charged to have been committed was within the jurisdiction of the justice. *The State v. Newton*, 1 Iowa, (Greene,) 160.

73. On the trial of an indictment for perjury in an action growing out of a written contract, it is necessary to produce the record or papers of the suit and the contract. *M' Murry v. The State*, 6 Ala. 324.

74. A. being sued before a justice of the peace, on a note for the payment of money, offered an affidavit as a plea, which described the note, and stated that A. did not sign said note, nor make his mark thereto, nor authorize any person to do so for him, and that said note was wholly unjust and forged. Held, that this affidavit was a sufficient plea of *non est factum* before a justice of the peace, and that a valid assignment of perjury might be made thereon. *The State v. Roberts*, 11 Humph. 539.

75. An indictment for perjury, under the statute in Iowa, is bad, which does not charge, in the language of the act, that the defendant "willfully and corruptly deposed, affirmed or declared matter to be fact, knowing the same to be false, or denied matter to be fact, knowing the same to be true. *The State v. Morse*, 1 Iowa, (Greene,) 503.

76. In an indictment for perjury against a party to a suit, it is necessary to show that he was sworn under circumstances which authorized him to be sworn as a witness in the case. *The State v. Hamilton*, 7 Mis. 300.

77. It is wrong to instruct a jury that "the want of motive or interest to swear false is a circumstance from which they are at liberty to infer that the testimony of the defend-

ant was not willfully and corruptly false." *Schaller v. The State*, 14 Mis. 502.

78. In an indictment against "John G. T." for perjury in making an affidavit signed by him, an affidavit signed "Jonh G. T." is not admissible in evidence, on account of the variance. *Tardy v. The State*, 4 Blackf. 152.

79. In the trial of an indictment for perjury in an answer to a bill of discovery, the certificate of the magistrate before whom the answer was sworn to, on proof of the handwriting of his signature, is competent and sufficient *prima facie* evidence of the administration of the oath to the defendant. *Commonwealth v. Warden*, 11 Met. 406.

80. On the question of perjury, the materiality of the facts testified to is a question of law. *Steinman v. Mc Williams*, 6 Barr, 170.

81. A defendant in chancery made oath that the matters and things contained in his answer, as set forth of his own knowledge, were true, and that those set forth on the information of others he believed to be true. An indictment against him for perjury charged, "that defendant was sworn, and took his corporal oath upon the holy Gospel of God, concerning the truth of the matters contained in his answer." Held, that his was at variance. In indictments for perjury, the proof must strictly sustain the charge. *Williams v. State*, 7 Humph. 47.

82. After proof that the oath had been made before a person who acted as a surrogate, the defendant showed that he had not been appointed according to the canon, and was acquitted. *Verelst's Case*, 3 Camp. 432.

83. Where the party administering the oath derives his authority from a special commission, directed to him for that purpose, it is necessary to prove the authority by the production and proof of the commission which creates the special authority. 2 Stark. Ev. 622, 2d ed.

84. Upon an indictment for perjury against a bankrupt, in passing his last examination, Lord ELLENBOROUGH ruled that it was necessary to give strict proof of the bankruptcy, which went to the authority of the commissioners to administer an oath, for unless the defendant really was a bankrupt,

the examination was unauthorized. *R. v. Punshon*, 3 Camp. 96; 3 B. & C. 354.

85. On an indictment for perjury alleged to have been committed on the hearing of an information under the beer act, 1 Wm. IV. c. 64, § 15, before two justices at petty sessions, PARKE and PATTESON, JJ., held that it was necessary to aver that the justices were acting in and for the divisions or place in which the house was situate; but that it was not necessary to allege they were acting in petty session, as every meeting of two justices in one place for business is itself a petty session. *Rawlin's Case*, 8 C. & P. 439.

86. Where the indictment merely stated that the defendant, intending to subject W. M. to the penalties of felony, went before two magistrates, and "did depose and swear," &c., (setting out a deposition, which stated that W. B. had put his hand into the defendant's pocket and taken out a £5 note,) and assigned perjury upon it, COLERIDGE, J., held that the indictment was bad, as it did not show that any charge of felony had been previously made, or that the defendants then made any charge of felony, or that any judicial proceeding was pending before the magistrate. *Pearson's Case*, 8 C. & P. 119.

87. Where perjury was charged to have been committed on that which was in effect the affidavit on an interpleader rule, and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of *fiere facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act, COLERIDGE, J., held that the indictment was bad, as the affidavit did not appear to be made on a *judicial* proceeding; since, for any thing that appeared, it might have been a voluntary oath. *R. v. Bishop*, Carr. & M. 302.

88. Perjury may be committed by swearing to a statement which in one sense is true, but which, in the sense intended to be impressed by the party swearing, is false, as in a case mentioned by Lord MANSFIELD. The witness swore that he left the party whose health was in question in such a way

that were he to go on as he then was, he would not live two hours. It afterwards turned out that the man was very well, but had got a bottle of gin to his mouth, and true it was, in a sense of equivocation, that had he continued to pour the liquor down, he would in less time than two hours have been a dead man. *Loft's Gilb. Ev.* 662.

89. Where the indictment, in setting out the *substance* and *effect* of the bill in equity upon the answer to which the perjury was assigned, stated an agreement between the prosecutor and the defendant respecting *houses*, and, upon the original bill being read, it appeared that the word was *house*, (in the singular number,) *ABBOTT, C. J.*, said, the indictment professes to describe the substance and effect of this bill; it does not, certainly, profess to set out the tenor, but this I think is a difference in substance, and consequently a fatal variance. *Spencer's Case*, Ry. & Moo. N. P. C. 98.

90. Where the witness stated that he could not undertake to say that he had given the whole of the prisoner's testimony, but to the best of his recollection he had given all that was material to the inquiry and relating to the transaction in question, *LITLEDALE, J.*, thought that the evidence was *prima facie* sufficient, and that if there was any thing else material sworn by the prisoner on the former trial, he might prove it on his part. No such evidence having been given, the prisoner was convicted, and on a case reserved, the judges held the proof was sufficient for the jury, and that the conviction was right. *Rowley's Case*, Ry. & Moo. N. P. C. 299.

91. On the trial of an indictment for perjury alleged to have been committed before a magistrate, the written deposition of the defendant, taken down by the magistrate, was put in to prove what he then swore, and it was proposed to call the attorney for the prosecution to prove some other matters sworn to by the defendant, which were not mentioned in the deposition, *PARKE, J.*, held that this could not be done. *Wylde's Case*, 6 C. & P. 380.

92. Where three or more persons were alleged to be jointly concerned in an assault, and it was contended to be immaterial if all participated in it, by which of them certain acts

were done, held to be material, and that evidence as to the acts of either, if willfully and falsely given, constituted perjury. *State v. Norris*, 9 N. H. 96.

93. Perjury may be committed by willfully false swearing in a point which is only circumstantially material to the question in dispute. *Commonwealth v. Pollard*, 12 Met. 225.

94. The vendor of goods having obtained a verdict in an action on a contract, upon proof of the same by bought and sold notes, the purchasers filed a bill in chancery for a discovery of other parol terms, and for equitable relief from the contract. The answer to the bill denied the existence of alleged parol terms. On an indictment assigning perjury upon the allegation which contained such denial, held, that the prayer of the bill being not to enforce the parol terms, but to obtain relief from the contract, the assignment of perjury was upon a matter material and relevant to the suit in chancery. *R. v. Yates*, Carr. & M. 132.

95. An indictment for perjury stated that it became a material question whether, *on the occasion of a certain alleged arrest*, L. touched K., &c. The defendant's evidence as set out was, "L. put his arms around him and embraced him;" innuendo, that L. had, *on the occasion to which the said evidence applied*, touched the person of K. It was held, by the court of King's Bench, that the materiality of this evidence did not sufficiently appear. *Nicholl's Case*, 1 B. & Ad. 21.

96. In order to show the materiality of the deposition or evidence of the defendant, it is essential, where the perjury assigned is in answer to a bill in equity, to produce and prove the bill, or if the perjury assigned is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court, in answer to which the affidavit in question has been made. If the assignment be on evidence on the trial of the cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. 2 Stark. Ev. 2d ed. 626.

97. Evidence must be given to prove the falsity of the matter sworn to by the defendant, but it is not necessary

to prove that all the matters assigned are false; for if one distinct assignment of perjury be proved, the defendant ought to be found guilty. *Rhode's Case*, 2 Lord Raym. 886.

98. Where the defendant's oath is as to his belief only, the averment that he "well knew to the contrary," must be proved. 2 Chitty C. L. 312.

99. The first observation on this part of the case is, that the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to show that the party is willfully perjured; I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection; but I should say, that it was not enough to show merely that the statement so made was untrue. *R. v. Parker*, Carr. & M. 639.

100. In *Champney's Case*, 2 Lew. C. C. 258, COLERIDGE, J., said, "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord TENTERDEN was of opinion that two witnesses were necessary to a conviction."

101. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded upon substantial justice, and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction. *R. v. Yates*, Carr. & M. 132.

102. Held, that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. *R. v. Parker*, Carr. & M. 639.

103. Where, upon an indictment for perjury, in an affidavit made by the defendant, a solicitor, to oppose a motion in the Court of Chancery to refer his bill of costs for taxation, only one witness was called, and, in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor, upon which it was objected that this was not sufficient, the bill not having been delivered on oath, DENMAN, C. J., was clearly of opinion, that the bill

delivered by the defendant was sufficient evidence, or that even a letter written by the defendant contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness. *Mayhew's Case*, 6 C. & P. 315.

104. There appears, however, to be an objection to this evidence, which is not easily removed, namely, that there is nothing to show which of the statements made by the defendant is the false one, where no other evidence of the falsity is given. Upon this subject the following observations were made by HOLROYD, J. : " Although you may believe that, on the one or the other occasion, the prisoner swore what was not true, it is not a necessary consequence that he committed perjury ; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time and another at another, you cannot convict, where it is not possible to tell which is the true and which is the false." *Jackson's Case*, 1 Lew. C. C. 270.

105. It is no objection to the competency of a witness, on an indictment for perjury committed in an answer in chancery, that in his answer to a cross-bill, filed by the defendant, he has sworn to the fact which he is to prove on the indictment. *Pepy's Case*, Peak N. P. C. 138.

106. If several persons are separately indicted for perjury, in swearing to the same fact, any of them, before conviction, may give evidence for the other defendants. 2 Hale P. C. 280.

107. Where a person was indicted for perjury, in giving false evidence before a grand jury, another witness on the same indictment, who was in the grand jury room while the prisoner was under examination, was held competent to prove what he swore before the grand jury ; and so a police officer, who was stationed within the grand jury room door, to receive the different bills and hand them to the foreman of the grand jury, these persons not being sworn to secrecy, though the grand jury are. *R. v. Hughes*, 1 C. & K. 519.

108. The cases in which a living witness to the *corpus delicti* of the defendant, in a prosecution for perjury, may be dispensed with, are: All such where a person, charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony, springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken. In cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it. *United States v. Wood*, 14 Peters, 430.

109. Where the affidavit upon which the perjury was assigned was signed only with the mark of the defendant, and the *jurat* did not state that the affidavit was read over to the party, LITTLEDALE, J., said, "As the defendant is illiterate, it must be shown that she understood the affidavit. Where the affidavit is made by a person who can write, the supposition is that such person is acquainted with its contents, but in the case of a marksman it is not so. If in such a case a master by the *jurat* authenticates the fact of its having been read over, we give him credit, but if not, he ought to be called upon to prove it. I should have difficulty in allowing the parol evidence of any other person." *Hailey's Case*, 1 C. & P. 258.

110. It is incumbent upon the prosecutor to give precise and positive proof that the defendant was the person who took the oath. *Brady's Case*, 1 Leach, 330.

111. This rule must not be taken to exclude circumstantial evidence. *Price's Case*, 6 East, 323; 2 Stark. Ev. 624, 2d ed.

112. It must appear that the oath was taken in the county where the venue is laid; and the recital in the *jurat* of the place where the oath is administered is sufficient evidence

that it was administered at the place named. *Spencer's Case*, Ry. & Moo. N. P. C. 98.

113. In a trial before a justice of the peace, if the plaintiff offer himself as a witness, is sworn and testifies falsely, perjury may be assigned on the oath thus taken. *Montgomery v. The State*, 10 Ohio, 220.

Rape.

1. On the trial of an indictment for rape, it is competent for the counsel for the prisoner, on the cross-examination of the prosecutrix, to ask her whether the treatment complained of "was with her consent or against her will." *Woodin v. The People*, Parker's Cr. 464.

2. Such a question is not objectionable in form, but if the objection to it had been put on that ground, and an exception taken, it would not have been available, for the form of a question, if not otherwise objectionable, is a matter of discretion with the court. *Ib.*

3. The credibility of witnesses is exclusively a question for the jury; and it is not erroneous in the court to refuse to charge the jury how they ought to find, in a case resting on the credibility of witnesses. *Ib.*

4. Where it appeared from the testimony of a physician that the prosecutrix for an alleged rape was of more than ordinary health and strength, and that the defendant was sixty years of age, the following question, put to the same witness, was held to be incompetent: "From what you know of her health and strength, in your opinion, could the defendant have had carnal connection with her against her will, without resort to other means than the exercise of his ordinary physical powers?" Held, that this was a question in regard to which the jury could judge equally well with the witness, and did not involve medical skill and science, and which was not a case for an expert. *Ib.*

5. Held, also, that the question, whether, in the opinion of the witness, a rape could be committed on a female who had borne children, and also was in ordinary health and strength,

without resort to other means than the exercise of ordinary physical powers, came within the same rule and was incompetent, though the prosecutrix had previously testified that she had borne two children before the alleged rape, and that the ravishment was accomplished by means of the superior strength of the prisoner. *Ib.*

6. When a man burglariously entered a room where a young lady was sleeping, and grasped her ankle, without any attempt at explanation, when she screamed, this is some evidence of an attempt to commit a rape, and must be submitted by the court to a jury. *The State v. Boon*, 13 Ired. 244.

7. Rape by a slave was an offence punishable by death, in Arkansas, before the statute of 1842. *Dennis v. The State*, 5 Pike, 230.

8. Two or more persons may be jointly indicted as principals for the commission of rape. *Ib.*

9. The statute of Mississippi, (Hutch. Dig. 918, § 21,) which provides that no person shall be convicted of an attempt to commit an offence, where it appears that the offence was actually committed, does not apply to the case of rape by a slave upon a white woman. *Wash v. The State*, 14 S. & M. 120.

10. In Mississippi, there is no statute prescribing the punishment of a slave for the commission of a rape upon a white woman, but the attempt to commit such offence is made capital. Held, that the statute making the commission of a rape a penitentiary offence does not apply to slaves. *Ib.*

11. Where the parts of a child, upon whom an attempt to carnally know her is proved by her to have been made, are shown to be bruised and infected with the venereal disease, proof of sexual intercourse between her and other persons, before and near the time of the commission of the alleged offence, is admissible, as tending to weaken the corroborative force of these circumstances. *Nugent v. The State*, 18 Ala. 521.

12. Where there is evidence conducing to show that a prisoner, charged with an assault with an intent to commit a rape, was at the time in a greatly debilitated condition from a previous debauch, it is a circumstance, however light, to

be considered by the jury in ascertaining whether he was physically capable of committing the offence. *Ib.*

13. Where a slave is indicted for an assault on a white woman with intent to commit a rape, it must appear, in the bill of exceptions, that the woman assaulted was a white woman. *Henry v. The State*, 4 Humph. 270.

14. Where one is indicted for an attempt to commit a rape, it is sufficient to aver matter enough to bring the case within the statute. *Williams v. The State*, Wright, 42.

15. An indictment which alleges "that J. N., late of said county, in and upon one H. S., (she, the said H. S., then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said H. S., then and there feloniously did abuse, in the attempt carnally to know," is fatally defective in not specifying with sufficient certainty and precision the person upon whom the attempt was committed. *Nugent v. The State*, 19 Ala. 540.

16. The Tennessee statute of 1835, c. 19, § 10, subjecting a slave to punishment of death for an assault with intent to commit a rape on a "free white woman," does not embrace the case of a female under ten years of age. *Sydney v. The State*, 3 Humph. 478.

17. An attempt by a negro to commit a rape on a white female under the age of puberty, is within the purview of the statute of Arkansas on that subject. *Charles v. The State*, 6 Eng. 389.

18. The 4th section of the act contemplates cases of carnal knowledge of females below the age of puberty, without force, and not forcible rapes; such females, nevertheless, are subjects of rape as well as females above that age. *Ib.*

19. In order to convict a negro of an attempt to commit rape upon a white female, it is essential to prove such intention as, if carried into execution, would constitute rape. *Ib.*

20. In this case it was held that a new trial should be granted, because it did not appear, from all the circumstances in proof, that the prisoner intended to accomplish his purpose by force. *Ib.*

21. An indictment under the Tennessee acts of 1833, c.

75, § 1, and 1835, c. 19, § 10, must distinctly aver that the assault committed by the slave, with intent to ravish, was on the body of a "free white woman." *Grandison v. The State*, 2 Humph. 451.

22. The law presumes that an infant, under the age of fourteen years, is incapable of committing, or attempting to commit, the crime of rape; but this presumption may be rebutted by proof that such person has arrived at the age of puberty. *Williams v. The State*, 14 Ohio, 222.

23. An indictment in which a count charging a negro with having had carnal knowledge of a white female child, under ten years of age, is joined with counts charging the commission of a rape upon a white female, and an assault with intent to commit a rape upon a white female, is fatally defective, as the offences are totally distinct in their natures. *The State v. Cherry*, 1 Swan, (Tenn.) 160.

24. The principles of circumstantial evidence illustrated, in an indictment for an assault with intent to commit a rape. *Bill v. The State*, 5 Humph. 155.

25. An indictment against a slave, for a rape on a free white woman, need not allege the ownership of such slave, and, if alleged and disproved, the variance is not fatal. *Peter v. The State*, 5 Humph. 436.

26. The court charged the jury, that if the female assaulted consented through fear, or consented after the fact, or was taken at first with her consent, if she was afterwards forced, the offence was committed. Held, that there was no error in this charge. *Wright v. The State*, 4 Humph. 194.

27. Under the Revised Statutes of Massachusetts, c. 137, § 11, a defendant indicted for a rape, alleged to have been committed upon his daughter, may be convicted of incest, if the jury find the criminal connection, but that it was not by force and against the will of the daughter. *The Commonwealth v. Goodhue*, 2 Met. 193.

28. Upon an indictment against a slave for a rape on a free white female, a verdict in these words, "we, the jury, find the prisoner guilty of an attempt to commit a rape," was held to be sufficiently full, and that it need not negative the charge of a rape, that being the legal effect of the find-

ing; neither was it necessary to add the words—"on a free white female," as, that being the issue submitted, the verdict was co-extensive with it. *Stephen v. The State*, 11 Geo. 225.

29. A rape may be committed on an infant. *Ib.*

30. A child under ten years old cannot consent to sexual intercourse, so as to rebut the presumption of force. *Ib.*

31. *Quere*, whether the same presumption will not be made in forcing one over ten years of age, who is still a child in stature, constitution and physical and mental developments. *Ib.*

32. In a prosecution for a rape, the fact that the woman made complaint soon after the assault took place, is evidence; the particulars of her complaint, however, cannot be gone into, and she will not be allowed to name the prisoner as the person who committed the injury, unless by way of information to lead his arrest. *Ib.*

33. On an indictment for a rape, the accused may be found by the jury not guilty of the offence charged, but of the attempt only, provided such finding is warranted by the evidence. - It was held, that it would not vitiate the verdict to swear the jury to try the prisoner for the attempt as well as the rape. *Ib.*

34. Where a woman swears to a rape committed on her person, evidence to establish her good character cannot be introduced until it is attacked by witnesses on the other side. *The People v. Hulse*, 3 Hill, 309.

35. A count in an indictment charging a rape, may be united with another count charging an assault with intent to commit a rape. *The State v. Sutton*, 4 Gill, 494.

36. In an indictment against a negro for an attempt to commit a rape on a white woman, the fact that the person assaulted is a white woman is a necessary ingredient to constitute the crime, and the averment that she is such, becomes a part of the substance of the issue material to be proved. *Pleasant v. The State*, 8 Eng. (3 Ark.) 360.

37. If the woman submits from terror, or the dread of greater violence, the intimidation becomes equivalent to force. *Ib.*

38. If a man accomplishes his purpose by fraud, or by sur-

prise, without intending to use force, it is not rape; because one essential ingredient of the offence, force, is wanting. So when force is used, but the assailant desists on resistance being made by the woman, and not because of an interruption, it could not be said that his intention was to commit rape. *Id.*

39. Though a woman, prosecuting a negro for an attempt to commit a rape, may be unchaste, or "of easy virtue," this is no justification of such assault on her by a negro. *Id.*

40. In an indictment against a negro for an attempt to commit a rape on a white woman, the allegation that the person assaulted was a white woman being material, the court erred in refusing to charge the jury, "that the jury should acquit the prisoner, unless the state should prove, to their satisfaction, that the person on whom the assault was committed is a white woman, and that the jury had seen her, or known her, or heard her testify, will not dispense with proof of that fact." *Id.*

41. In the trial of an indictment against a negro for attempting to commit a rape on a white woman, the prisoner's counsel asked the court to charge the jury that the state must prove that he was a negro in order to convict, and though he was black, their seeing him was no proof that he was a negro. Held, that inasmuch as the instruction assumed that the prisoner was black, the presumption arising from color, that he was a negro, would prevail, and that the instruction was properly refused. *Id.*

42. Where a prisoner is tried in a court of general sessions, in New York, for a rape, and an assault with an intent, &c., and the jury convict of an assault and battery only, judgment cannot be rendered, the sessions not having jurisdiction of the offence of rape. *The People v. Abbot*, 19 Wend. 192.

43. On a trial for rape, or an assault with an intent, the prosecutrix may be asked whether she had previous connection with other men. *Id.*

44. She may be shown to be a prostitute; and a previous voluntary connection between her and the prisoner may be proved; and evidence given of acts indicating her want of chastity. *Id.*

45. Unless the inquiry is made to show a discrepancy in the testimony of the prosecution, the magistrate who heard the complaint cannot state what she testified before him as to her previous connection with other men. *Ib.*

46. Upon an indictment for a rape, where the injured party is examined as a witness, her complaint of the injury, and her narrative of the circumstances connected therewith, made recently after the commission of the offence, are admissible evidence in confirmation of her testimony, and may be proved by the persons to whom such complaint and narrative were made. *Phillips v. The State*, 9 Humph. 246.

47. An indictment for a rape, charged "that the defendant, with force and arms, &c., in and upon one Mary Ann Taylor, in the peace of the state, &c., violently and feloniously did make an assault, and her, the said Mary Ann Taylor, then and there, violently and against her will, feloniously did ravish and carnally know." Held, that the court could and must see with certainty that Mary Ann Taylor was a female. *The State v. Farmer*, 4 Ired. 224.

48. In North Carolina, in an indictment for a rape, it is not necessary to state that the female ravished was of the age of ten years. *Ib.*

49. Upon the trial of an indictment for rape, the declarations of the injured female, made immediately after the alleged offence, are not admissible evidence for the prosecution to prove the offence committed; and the rule is the same, though it appear that she is incompetent to testify on account of immature age, idiocy or other mental defect. *The People v. M'Gee*, 1 Denio, 19.

50. Such declarations are only competent where the party injured has given evidence as a witness, and then only upon the question of her credibility. *Ib.*

51. Where the injured person is of sufficient age, and of competent though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may yet be sworn as a witness, and examined through the medium of a person who can understand her, who is to be sworn to interpret between her and the court and jury. *Ib.*

52. Upon an indictment for a rape, after the examination

of the testimony and the arguments of counsel were on both sides closed, the court permitted the prosecuting attorney to prove where the offence was committed. Held, that this proceeding was not erroneous. *Harker v. The State*, 8 Blackf. 540.

53. If, instead of the course pursued, a *nolle prosequi* had been entered, the prisoner could not have been indicted again for the same offence. *Ib.*

54. Under the North Carolina act of 1823, it is necessary to charge that the assault was made with an intent to commit a rape. *The State v. Martin*, 3 Dev. 329.

55. A white girl, under twelve years of age, and not having attained to puberty, is a white woman, within the meaning of the Virginia statute, making it felony, punishable with death, for a slave, free negro or mulatto, to attempt to ravish a white "woman." *Watt's Case*, 4 Leigh, 672.

56. In an indictment for rape, the words, "forcibly and against the will," are necessary. *The State v. Jim*, 1 Dev. 142.

57. In Virginia, upon an indictment against a free negro on the statute of 1822-3, c. 34, § 3, it was found that the defendant, not intending to have carnal knowledge of the woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no force. Held, that this was not an attempt to ravish, within the meaning of the statute. *Field's Case*, 4 Leigh, 648.

58. An indictment, under the North Carolina statute, for abusing and carnally knowing a female child under the age of ten years, which charges the rape to be "in and upon one M. C., an infant under ten years of age," &c., "and her, the said M. C., feloniously did unlawfully and carnally know and abuse," &c., is sufficient, without describing the infant as a "female child;" nor is the addition of "spinster" to the name of the infant requisite in such an indictment. *The State v. Terry*, 4 Dev. & Bat. 152.

59. An indictment for rape must conclude in the form of the statute. *The State v. Dick*, 2 Murph. 388.

60. If the description of rape in an indictment leave out

the word "unlawfully," but be in accordance with the common law definition of the offence, it is sufficient. *Weinzorpflin v. State*, 7 Blackf. 186.

61. On an indictment for an assault with intent to commit a rape, evidence of reputation that the woman alleged to have been assaulted was of ill-fame in respect to chastity, is admissible to impeach her credibility as a witness in the case, as well as to show the intent of the accused. *Camp v. State*, 3 Kelly, 417.

62. The prisoner was indicted for burglary, with intent to commit a rape. It appeared that the prisoner got into the woman's bed, as if he had been her husband, and was in the act of copulation when she made the discovery, upon which, and before completion, he desisted. The jury found that he had entered the house with intent to pass for her husband, and to have connection with her, but not with the intention of forcing her, if she made the discovery. The prisoner being convicted, upon a case reserved, four of the judges thought that the having carnal knowledge of a woman, whilst she was under the belief of its being her husband, would be a rape; but the other eight judges thought that it would not. Several of the eight judges intimated that if the case should occur again, they would advise the jury to find a special verdict. *Jackson's Case*, Russ. & Ry. 487.

63. Evidence of familiarities by the prisoner and others with the woman, tending to disprove the allegation of force, is admissible. *State v. Jefferson*, 6 Ired. 305.

64. So she may be proved to be a strumpet, but this must be by general evidence, and not by evidence of particular instances. *Id.*

65. Rape is defined by Lord HALE to be the carnal knowledge of any woman, above the age of ten years, against her will; and of a woman child under the age of ten years, with or against her will. 1 Hale P. C. 628.

66. If the witness be of good fame, if she presently discovered the offence, and made pursuit after the offender, showed circumstances and signs of the injury, (whereof many are of that nature that women only are the most proper examiners and inspectors,) if the place in which the fact was done was

remote from people, inhabitants or passengers, if the offender fled for it, these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. 1 Hale, 633.

67. It is sufficient if an indictment for rape charges the defendant with feloniously ravishing and carnally knowing a woman. *Harman v. Commonwealth*, 12 S. & R. 69.

68. It seems that it is as much a rape when effected by stratagem as by force. *People v. Barton*, 1 Wheeler's C. C. 378, 381, n.

69. An infant under the age of fourteen years is presumed by law unable to commit a rape, but he may be a principal in the second degree, as aiding and assisting, if it appear by the circumstances of the case that he had a mischievous intent. 1 Hale P. C. 630.

70. In an indictment for rape, emission need not be proved. *Pennsylvania v. Sullivan*, Addis. 143.

71. Where a prisoner was convicted of a rape, on an indictment which charged that he, "in and upon E. F., &c., violently and feloniously did make (omitting the words 'an assault,') and her, the said E. F., then and there, against her will, violently and feloniously did ravish and carnally know, against the form of the statute," &c., it was held by ten of the judges that the omission of these words was no ground for arresting the judgment. *R. v. James Allen*, 9 C. & P. 521.

72. Where a lad under fourteen was charged with an assault to commit a rape, PATTESON, J., said, "I think the prisoner could not, in point of law, be guilty of the offence of assault with intent to commit a rape, if he was at the time of the offence under the age of fourteen. And I think, also, that if he was under that age, no evidence is admissible to show, that in point of fact he could commit the offence of rape." *Phillipp's Case*, 8 C. & P. 736.

73. In an indictment under the 3d section of the Virginia act against rape, if the charge is for carnally knowing and abusing a "female" child, under ten, instead of a "woman" child; or if the word "unlawfully" is omitted, the indictment is nevertheless good after verdict. *Commonwealth v. Bennett*, 2 Virg. Cas. 235.

74. The 1st section of the Virginia act against rape applies only to a rape on a female over ten years of age; the 3d section to cases where she is under ten, and applies whether she consent or not, such a child being incapable of consent. *Ib.*

75. If a count for rape, under the 3d section of the Virginia act, charges more than is necessary, such part may be rejected as surplusage. *Ib.*

76. In indictments under the Virginia statutes against rape, which enact a punishment against free persons different from that of slaves, it is not necessary to allege that a prisoner is a white person. *Ib.*; *Young v. Commonwealth*, 2 Virg. Cas. 328.

77. GURNEY, B., said, "I think that if the hymen is not ruptured, there is not sufficient penetration to constitute the offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases." *Gammmon's Case*, 5 C. & P. 321.

78. It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape. The prisoner was found guilty of an assault. *M'Rue's Case*, 8 C. & P. 641.

79. Evidence of the least penetration justifies a conviction for rape. *State v. La Blanc*, Const. 354.

80. On a trial for rape, it was proved that the prisoner made the prosecutrix quite drunk, and that when she was in a state of insensibility, the prisoner took advantage of it and violated her. The jury convicted the prisoner, and found that the prisoner gave her liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her. The fifteen judges held that the prisoner was properly convicted of rape. *R. v. Chaplin*, 1 C. & K. 746.

81. Upon an indictment for carnally knowing a girl under

ten years of age, the proof for the prosecution will be, 1. The commission of the offence; 2. That the child is under ten years of age. *Roscoe's Cr. Ev.* 864.

82. On a trial for rape, the prosecutrix having on cross-examination denied that she had had connection with other men than the prisoner, those men may be called to contradict her. *R. v. Robins*, 2 Moo. & R. 512.

83. Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent. 1 Hale, 635.

84. Where the offence was committed on the 5th of February, 1832, and the father proved, that on his return home on the 9th of February, 1832, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that she had been baptised on the 9th of February, 1832; this evidence was held insufficient to prove the age. *Wedge's Case*, 5 C. & P. 298.

85. If, on the trial of an indictment under this statute, the jury are satisfied that at any time any part of the virile member of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence. *R. v. Lines*, 1 C. & K. 393.

86. Where the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood; and it appeared that neither the mistress nor the washerwoman were under recognizance to give evidence, nor were their names on the back of the indictment, but they were at the assizes as witnesses for the prisoner, POLLOCK, C. B., directed that they should both be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in the examination. *R. v. Stroner*, 1 C. & K. 650.

87. The prosecutrix may be asked whether, previous to the commission of the alleged rape, the prisoner had not had intercourse with her, with her own consent. *Martin's Case*, 6 C. & P. 562.

88. In order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Lloyd's Case*, 7 C. & P. 318.

Riot.

1. If persons innocently and lawfully assembled, afterwards confederate to do an act of unlawful violence, suddenly proposed and assented to, and thereupon do an act of violence in pursuance of such purpose, although their whole purpose should not be consummated, it is a riot. *The State v. Snow*, 6 Shep. 346.

2. It is a riot for a number of persons, unlawfully combined, to disturb others in the enjoyment of their lawful rights. *Commonwealth v. Runnels*, 10 Mass. 518.

3. In an indictment for a riot, it is sufficient to allege that the defendants assembled "with force and arms," and, being so assembled, committed acts of violence, without repeating the words "force and arms." *Id.*

4. On an indictment for riot and a riotous assault and battery, by four persons, one of them may be convicted of the assault and battery, and the others acquitted of the whole. *Shouse v. Commonwealth*, 5 Barr, 83.

5. On the trial of persons indicted for a riot, a count of the indictment setting forth that they, with others, riotously assembled, to the disturbance of the public peace, and then riotously began to pull down a certain dwelling-house, was held to be sufficient, although it did not state the unlawful act which they were assembled to commit. *The Commonwealth v. Jenkins*, Thacher's Crim. Cas. 118.

6. Where three or more armed persons assemble to assist one another in a private enterprise, and execute the same in a threatening manner, it is a riot, whether the act done be lawful or not. *State v. Brooks*, 1 Hill, (S. C.) 361.

7. In an indictment for a riot and forcible trespass in entering a man's dwelling-house, he being in the actual possession thereof, and taking from his possession slaves and other personal property, it is not necessary to show that the prosecutor had the right to the property, or the right to the possession, but whether he had in fact the possession thereof at the time when that possession was charged to have been invaded with such lawless violence; and any evidence tending to establish that possession is admissible. *The State v. Bennett*, 4 Dev. & Bat. 43.

8. To constitute a person a rioter, it is not necessary that he should be actively engaged in the riot; it is sufficient that he be present, giving countenance, support or acquiescence to the act. *Williams v. State*, 9 Mis. 270.

9. A justice of the peace is indictable for not attempting to suppress a riot. *Respublica v. Montgomery*, 1 Yeates, 419.

10. Where an indictment for a riot alleged that the defendants "fought through and with each other," it was held, that if the words were necessary, it would be necessary to allege that it was done riotously, but that the words were not necessary, and that the omission of such allegation did not vitiate the indictment. *The State v. Dillard*, 5 Blackf. 365.

11. An indictment charging a riot and forcible trespass to land which is in the actual possession of a tenant of the owner, should charge the possession to be in the tenant, and not in the owner; if the latter is charged to be in possession, proof of the possession of his tenant will not support the indictment. *The State v. Wilson*, 1 Ired. 32.

12. A riot is the execution, with force, of an enterprise of a private nature, by three or more persons, with an understanding mutually to assist each other. *State v. Cole*, 2 M'Cord, 117.

13. To support an indictment for a riot in obstructing and breaking up a justice's court, it is not necessary to allege or prove that the person holding the court was a commissioner, or that he was proceeding lawfully in the business before him. *The State v. Boies*, 34 Maine, (4 Red.) 235.

14. An indictment for a riot, alleging an "intent to make an assault, with force and arms," is not sufficient; it should allege the act to have been done with force and violence. *Martin v. State*, 9 Mis. 286.

15. Where there is an indictment against three for a riot, and a verdict of guilty as to one, and not guilty as to the others, a judgment cannot be rendered on the verdict against him found guilty. *Turpin v. The State*, 4 Blackf. 72.

16. *Aliter*, if the indictment be against one and others unknown. *Ib.*

17. If an assembly is lawful, as upon summons to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled will not make them rioters; the assembly must have been unlawful. *The State v. Stalcup*, 1 Ired. 30.

18. Indictment lies for besetting a house with intent to wound, tar and feather. *Pennsylvania v. Cribs*, Addis. 277.

19. In Missouri, the name of the prosecutor must be endorsed on an indictment for a riot. *McWaters v. State*, 10 Mis. 167.

20. Such objection may be first raised on appeal in the Supreme Court. *Ib.*

21. In an indictment for a riot, it is not necessary to charge, in terms, that the defendants assembled unlawfully, and unlawfully did the act alleged against them, but only to set forth circumstances which show that they did, in fact, unlawfully assemble and do an unlawful act. *Ib.*

22. Upon an indictment for a riot, it is only necessary to prove the possession of the prosecutor, and that may be done by parol evidence, without the production of any paper evidence of title. *The State v. Wilson*, 1 Ired. 32.

23. Three persons are necessary to consummate a riot. *Maxwell v. Carlile*, 1 M'Cord, 534.

24. Two white persons and a negro slave can commit a riot. *State v. Calder*, 2 M'Cord, 462.

25. Two or more persons should actually be engaged in some physical act of violence, to constitute a riot, in Iowa. Where a single person is engaged in the act of violence, and

others stand by inciting him to the act, it is not a riot. *Scott v. United States*, 1 Morris, 142.

26. In an indictment for a riot, in which an unlawful act has been committed, the words *in terrorem* are not necessary, they being required only when the gist of the offence consists in the terror of the public inspired by the conduct of the parties. *The State v. Whitesides*, 1 Swan, (Tenn.) 88.

27. An indictment for a riot in pulling down a "dwelling-house," should set forth whose house it is; and where the house is occupied by a *feme covert*, who is absent from the state, it should be described as the house of her husband. *The State v. Martin*, 3 Murph. 533.

28. The averment, that the acts charged were done *in terrorem populi*, is unnecessary in such indictment, if there is a charge of unlawful acts riotously committed. *Commonwealth v. Runnels*, 10 Mass. 518.

29. An indictment for a riot charged two defendants, named, with divers other persons to the jurors unknown, to the number of ten. Held sufficient. *The State v. Brazil*, 1 Rice, 257.

30. One seen coming from the rioters, armed and intoxicated, styling himself the leader, was held a rioter. *Id.*

31. In Illinois, if two or more persons being together, do an unlawful act with force and violence against the person or persons of another, or a lawful act in a violent or tumultuous manner, this constitutes a riot. *Dougherty v. The People*, 4 Scam. 179.

32. To support an indictment for a riot, the defendants must be active in doing or countenancing an unlawful act, or stand ready to support such act. *Pennsylvania v. Craig*, Addis. 190.

33. A negro slave, whether acting under the commands of his master or not, may, in contemplation of law, be one of the three persons necessary to constitute the offence of a riot. *The State v. Jackson*, 1 Speers, 13.

34. In Kentucky, no prosecutor is required upon an indictment for a riot. *The Commonwealth v. Bybee*, 5 Dana, 219.

35. Nor will an appeal or writ of error lie on a judgment upon such an indictment. *Id.*

36. Where persons unknown were necessary, with the persons indicted, to commit the offence of riot, they should be stated to be unknown, and so proved; if known, it should be stated who they were. *State v. Calder*, 2 M'Cord, 462.

37. On an indictment for a riot, in South Carolina, it appeared that two white persons and a negro slave went together to a place where one B. was at work; that upon their arrival there, one of the white persons cut a club, in the presence of the other two, used threatening language to B., and commanded his associates to cut up house logs, which B. had prepared, which they did. Held, that these acts were sufficient to constitute a riot. *The State v. Jackson*, 1 Speers, 13.

38. In a prosecution for riot, under the 2d section of the Virginia riot act, the defendants ought not to be tried and convicted without an inquisition or indictment found against them, setting forth the nature and cause of the accusation. *Mackaboy v. Commonwealth*, 2 Virg. Cas. 268.

39. Two persons who meet, and stake money, and prepare to engage in a prize-fight, and cause a tumult, are guilty of a riot. *The State v. Sumner*, 2 Speers, 599.

40. A separate trial was refused to defendants, indicted jointly for a riot and assault. *State v. Littlejohn*, 1 Bay, 316.

41. In an indictment for a riot and breaking into an out-house, proof that the house was within the curtilage, and that the door was broken in a riotous manner, without any demand or refusal to admit, is competent and necessary testimony under a count for a riot, and is admissible in aggravation of the offence, although there is no count charging a breaking into a house within the curtilage. *Douglass v. The State*, 6 Yerg. 525.

42. In an action against the county for damages by a mob, in Pennsylvania, evidence of unlawful conduct by men assembled within a church, of which the plaintiff was pastor, was excluded as irrelevant, it being shown that he was absent from the city at the time. *Donoghue v. County*, 2 Barr, 230; *Lavery v. County*, 2 Barr, 231.

43. An indictment for a riot need not allege any other

unlawful purpose for which the rioters assembled than that of disturbing the peace. *The State v. Renton*, 15 N. H. 169.

44. Upon the trial of such an indictment, evidence of riotous assemblages in previous years is not admissible, either for the purpose of rebutting a defence that this assemblage was of a peaceful character, by comparing it with former assemblages, or of giving a character in the first instance to the assemblage in question. *Ib.*

45. It is not competent to prove that a person has a disposition to commit the particular offence with which he is charged. *Ib.*

46. Upon the trial of an indictment for a riot, evidence that the respondent was engaged in riotous proceedings in previous years, is not relevant to the issue. *Ib.*

47. Notice under the act need only be given when the owner has knowledge of the intended attack. *Donoghue v. County*, 2 Barr, 230.

48. Verbal notice, "that it was expected the church would be attacked, and if so, the school-house would go, too," is sufficient in case of the destruction of the school-house. *Ib.*

49. Whether an agent to sell the house merely, can give such notice; *quere?* *Ib.*

50. Transactions during the riot are properly excluded as irrelevant, unless the plaintiff can be implicated. *Ib.*

51. The omission to set out, in the declaration, the ward in which the property is situated, is cured by the verdict. *Ib.*

52. An accidental destruction by fire, communicated from a building fired by a mob, is within the act giving a remedy against the county. *Ib.*

53. The common law concerning the offence of riot is not in force in Missouri. *Smith v. The State*, 14 Mis. 147.

54. Under the statute of Missouri, to constitute a riot, the act done or attempted to be done must be an unlawful act, and must be done or attempted in a violent or turbulent manner. *Ib.*

55. Under the act of 1833, c. 90, in Tennessee, which provides that if any one shall sell, or offer to sell, bread or other articles mentioned in the act, within a mile of any

worshipping assembly, so as to interrupt such assembly, such person shall be dealt with as a rioter, it was held, that the illegal intent of the party so selling would be inferred from his doing and persisting in the acts which were the primary cause of the disturbance. *West v. The State*, 9 Humph. 66.

56. In a criminal prosecution for a riot, it is no defence that two persons only were engaged in the illegal physical act, if a third person was at the time aiding and abetting them by his presence. *The State v. Straw*, 33 Maine, (3 Red.) 554.

57. A riot is a tumultuous disturbance of the peace, by three or more persons, assembled together of their own authority, with the intent mutually to assist each other against any one who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not. *State v. Connolly*, 3 Rich. 337.

58. An unlawful assembling must be proved, and therefore, if a number of persons met together at a fair, suddenly quarrel, it is an affray, and not a riot; but if, being so assembled, on a dispute occurring, they form into parties, with promises of mutual assistance, and then make an affray, it will be a riot; and, in this manner, any unlawful assembly may be converted into a riot; so a person joining rioters is equally guilty as if he had joined them while assembling. *Hawk. P. C. b. 1, c. 65, s. 3.*

59. Any meeting whatsoever, of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult respecting the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. *Hawk. P. C. b. 1, c. 65, s. 9.*

60. If several be indicted for riot, and there is proof against one only, all must be acquitted. *Pennsylvania v. Huston et al.*, Addis. 344.

61. If a number of persons come to a theatre, and make a great noise and disturbance, with the pre-determined purpose of preventing the performance, it will be a riot, though no personal violence is done to any individual, and no injury done to the house. *Clifford v. Brandon*, 2 Campb. 358.

62. It was shown that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies, to a certain extent arranged and organized, and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say that they were left to the consideration of the jury in a manner less favorable to the defendants than the evidence warranted. And if this appearance was in itself proper for the consideration of the jury, it must have been proper to show to them, that at the very place from which one of these bodies came, a number of persons had assembled before day-break, and had been formed and instructed to march as soon as there was light enough for such an operation, and that some of the persons thus assembled had grossly ill-treated two others whom they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a king's man again, or to name the name of a king; and that another of the bodies that went to the place of meeting, expressed their hatred towards this person by hissing as they passed his doors. These matters were unquestionably competent evidence upon the general character and intention of the meeting. *Hunt's Case*, 3 B. & Ad. 566.

Robbery.

1. Robbery is the felonious taking of goods from the person of another, or in his presence, by violence, or by putting him in fear, and against his will. *U. States v. Jones*, 3 Wash. C. C. 209.

2. To constitute the offence made punishable by the Massachusetts Revised Statutes, c. 125, § 15, the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person; and these facts must be alleged, in an indictment on that section, in the same manner as in an indictment for robbery at common law. *Commonwealth v. Clifford*, 8 Cush. 215.

3. To constitute robbery, it is not necessary that the person robbed must have been first in fear of his person or property; if the goods be taken either in violence or by putting the owner in fear, it is sufficient to render the felonious taking a robbery; and to the same effect is the statutory definition of robbery in Mississippi. *McDaniel v. State*, 8 S. & M. 401.

4. On the trial of an indictment for robbery, under the 15th section of the crimes act, by putting in fear the complainant, it is not necessary that the property taken should have been actually severed from his person. It is sufficient if the property was in the presence of the owner, and under his immediate control, and was taken while he was under such fear, by the accused, with intent to steal or rob. *Turner v. The State*, 1 Ohio, 422.

5. The term "personal property," used in the crimes act, comprehends bank notes and other *choses in action*, and they can, therefore, be the subjects of robbery. *Ib.*

6. Where the indictment avers an actual stealing of bank notes, the intent to steal is necessarily intended, as well as the knowledge that they were bank notes. *Ib.*

7. Where an indictment for robbery contains a particular description of bank notes taken, and erroneously avers them to be "money, goods and chattels," these words may be rejected as surplusage, and the count will be good. *Ib.*

8. An indictment for robbery is good, at common law, which alleges the stealing, &c., by force and violence, but omits the averment that the party robbed was put in fear. *Commonwealth v. Humphries*, 7 Mass. 242.

9. In a prosecution for robbery, it is competent to show, by the person robbed, that, at the time of the robbery, he was "scared." *Long v. The State*, 12 Geo. 293.

10. By the penal code of Georgia, robbery is committed by force or intimidation. Force implies actual personal violence, a struggle and a personal outrage. Intimidation is constructive force, the putting in fear; and where property is extorted by fear, it is robbery, though it be taken under the color of a gift. But the taking must be against the will of the person robbed. *Ib.*

11. If the taking be under such circumstances as would be likely to create an apprehension of danger in the mind of a man of ordinary experience, and induce him to part with his property for the safety of his person, it is robbery. Actual fear need not be strictly proven. It will be presumed. *Ib.*

12. Nor is it indispensable that the delivery of the property be contemporaneous with the assault, if there be force, or with the first impression of fear in case of threats or circumstances of terror; but if the property be delivered afterwards, and whilst the fear or apprehension of danger continues, it may be robbery. *Ib.*

13. The taking must be *animo furandi*; the taking by force or intimidation being proved, the *animus furandi* will be inferred from the appropriation of the property. *Ib.*

14. The criterion which distinguishes robbery from larceny is the violence, actual or constructive, which precedes the taking. There can be no robbery without violence, and there can be no larceny with it. *Ib.*

15. Threats of prosecution do not amount to that constructive violence which will change an offence from larceny to robbery, except in one instance, namely, a threat to prosecute for an unnatural crime. *Ib.*

16. If, however, threats to prosecute for other crimes are accompanied with force, actual or constructive, and money or other property be given up in consequence, the transaction is robbery, and the offence is not mitigated by the guilt of the party threatened, nor aggravated by his innocence. *Ib.*

17. Under the penal code of Georgia, there is only one offence of robbery, but two grades thereof, namely, robbery by force and robbery by intimidation, both of which may

be charged in one count, provided in that count the offence is described in the language of the Code, or so plainly that the jury may easily understand its nature ; and the jury may find the defendant guilty generally, in which case the highest penalty will be inflicted ; or they may find him guilty of the lower grade, and the judgment and penalty will go accordingly. *Ib.*

18. To take a man by the cravat, squeeze him against a wall, and, in the mean time, abstract his watch from his fob without his knowledge, is a robbery, though the plaintiff was not afraid, nor aware of the robber's intention. *Commonwealth v. Snelling*, 4 Binn. 379.

19. An indictment for highway robbery which charges the offence to have been committed near the highway, is good. *State v. Anthony*, 7 Ired. 234.

20. An indictment for robbery, which alleges that the defendant made an assault upon A. and put him in fear of his life, and did take, steal and carry away feloniously the money of said A., is insufficient, because it does not state that the money was taken from the person of A., and against his will, which is an essential averment. *Kit v. The State*, 11 Humph. 167.

21. If a number of persons associate together to commit a robbery, and one alone perpetrates the act, all are constructively present, and are guilty. *State v. Heyward*, 2 N. & M. 312.

22. To extort money, or other valuable things, by threatening a criminal prosecution for passing counterfeit money, is not to commit a robbery. *Britt v. State*, 7 Humph. 45.

23. Robbery from the person, which is a felony at common law, is thus defined : a felonious taking of money or goods of any value from the person of another, or in his presence against his will, by violence and putting him in fear. 2 East P. C. 707.

24. Under the Massachusetts statute of 1818, c. 124, providing a penalty if any person shall rob, being armed with a dangerous weapon, with intent to kill or maim the person robbed, or if, being armed, he shall actually strike the person robbed, it is sufficient if the robber have the intent to kill or

maim, as a means of effecting the robbery, if necessary, although not an intent to kill or maim at all events. *Commonwealth v. Martin*, 17 Mass. 359.

25. There must, however, be an intent to kill, if necessary, to constitute the chief offence of the statute. An intent merely to terrify is not sufficient. *Ib.*

26. The Massachusetts statute of 1804, c. 142, which contains the terms robbing "by force, violence or other assault, and putting in fear," has not added to the common law requisites in this particular. *Commonwealth v. Humphries*, 7 Mass. 242.

27. Upon an indictment for robbing the mail, and putting the life of the mail-carrier in jeopardy, a sword or pistol, in the hand of the robber, by terror of which the robbery is effected, is a "dangerous weapon" within the law, although the sword be not drawn and the pistol be not pointed. *United States v. Wood*, 3 Wash. C. C. 440.

28. The word "rob," in the act of congress of 1825, § 22, is used in its common law sense. *United States v. Wilson*, 1 Baldwin, 78.

29. "Jeopardy," as used in that section, means a well-grounded apprehension of danger to life, in case of refusal or resistance. *Ib.*

30. Pistols are "dangerous weapons" within the act; the offer or threat to shoot with them comes within the law, without proof that they were loaded. *Ib.*

31. An indictment charging the robbery to have been committed in the highway, is not supported by evidence of a robbery *near* the highway. *State v. Cowan*, 7 Ired. 239.

32. An indictment for highway robbery, which alleges the taking of the property from the person "feloniously and violently," sufficiently alleges the putting in fear. *Ib.*

33. Where a man was knocked down and his pockets rifled, but the robbers found nothing, except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. *Bingley's Case*, 5 C. & P. 602.

34. The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room, for the purpose of

extorting money from him. Upon a table covered with black silk were two candlesticks, covered also with black, a pair of large horse pistols ready cocked, a tumbler glass filled with gunpowder, a saucer with leaden balls, two knives, one of them a prodigiously large carving knife, their handles wrapped in black crape, pens and inkstand, several sheets of paper and two ropes. The prisoner, Mrs. Pipoe, seized the carving knife, and threatened to take away the prosecutor's life; the latter was compelled to sign a promissory note for £2,000, upon a piece of stamped paper which had been provided by the prisoner. It was objected that there was no property in the prosecutor, and the point being reserved for the opinion of the judges, they held accordingly. They said that it was essential to larceny that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written, for it appeared that both the paper and ink were the property of Mrs. Pipoe, and the delivery of it by her to him could not, under the circumstances of the case, be considered as vesting it in him; but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. *Pipoe's Case*, 2 Leach, 673.

35. A servant, who had received money from his master's customers, was robbed of it on his way home. Upon its being objected that the money could not be laid as the property of the master, ALDERSON, B., inclined to think the objection valid, and would have reserved the point, but as the grand jury were sitting, the learned baron directed the jury to be discharged, and a new indictment to be preferred, containing a count laying the property in the servant. *Rudick's Case*, 8 C. & P. 237.

36. The prisoner had set wires in which game was caught. The gamekeeper finding them, was carrying them away,

when the prisoner stopped him and desired him to give them up. The gamekeeper refused, upon which the prisoner, lifting up a large stick, threatened to beat out the keeper's brains if he did not deliver them. The keeper, fearing violence, delivered them. Upon an indictment for robbery, VAUGHAN, B., said, "I shall leave it to the jury to say, whether the prisoner acted upon an impression that the wires and pheasant were his own property, for, however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail. The prisoner was acquitted. *Hall's Case*, 3 C. & P. 409.

37. It must be proved that goods are taken either by violence, or that the owner was put in fear, but either of these facts will be sufficient to render the felonious taking a robbery. 2 East P. C. 708.

38. "I am very clear," says Mr. Justice FOSTER, "that the circumstances of actual fear, at the time of the robbery, need not be strictly proved. Suppose the true man is knocked down, without any previous warning to awaken his fears, and lies totally insensible, while the thief rifles his pockets, is not this robbery?" Foster, 128.

39. Two prisoners were indicted for assaulting the prosecutor and robbing him of a bundle. It appeared that the prosecutor had the bundle in his own personal custody, in a beer-shop, and when he came out, gave it to his brother, who was with him, to carry it for him. While on the road, the prisoner assaulted the prosecutor; upon which, his brother laid down the bundle in the road and ran to his assistance. One of the prisoners then took up the bundle and made off with it. VAUGHAN, B., intimated an opinion, that the indictment was not maintainable, as the bundle was in the possession of another person at the time of the assault committed. Highway robbery was the felonious taking of the property of another by violence, against his will, either from his person or in his presence. The bundle, in this case, was not in the prosecutor's possession. If the prisoners intended to take

the bundle, why did they assault the prosecutor, and not the person who had it? The prisoners were convicted of simple larceny. *Fallow's Case*, 5 C. & P. 508.

40. A case is said to have been mentioned by HOLROYD, J., which occurred at Kendal, and in which the evidence was that a person ran up against another, for the purpose of diverting his attention while he picked his pocket; and the judges held, that the force was sufficient to make it a robbery, it having been used with that intent. *Anon.*, 1 Lew. C. C. 300.

41. The prosecutor, passing along the street, was accosted by the prisoner, who desired he would give him a present. The prosecutor asking, for what? the prisoner said, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea. Two days afterwards the prisoner obtained a further sum of money from the prosecutor by similar threats. The prosecutor swore that he was exceedingly alarmed upon both occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life. The jury found the prisoner guilty of robbery, and that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. The case being reserved for the opinion of the judges, they gave their opinions *seriatim*, (see 2 East P. C. 716,) and afterwards the result of their deliberations was delivered by Mr. Justice WILLES. They unanimously resolved that the prisoner was rightly convicted of robbery. This, says Mr. Justice WILLES, is a threat of personal violence, for the prosecutor had every reason to believe that he should be dragged through the streets as a culprit, charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money. *Donally's Case*, 1 Leach, 193.

42. The prosecutrix was brought before a magistrate by the prisoner, into whose custody she had been delivered by

a headborough, on a charge of assault. The magistrate recommended the case to be made up. The prisoner (who was not a peace officer) then took her to a public house, treated her very ill, and finally handcuffed and forced her into a coach. He then put a handkerchief into her mouth, and forcibly took from her a shilling, which she had previously offered him, if he would wait till her husband came. The prisoner then put his hand into her pocket and took out three shillings. Having been indicted for this as a robbery, NARES, J., said, that in order to commit the crime of robbery, it is not necessary the violence used to obtain the property should be by the common modes of putting a pistol to the head or a dagger to the breast; that a violence, though used under a colorable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, that if they thought the prisoner had, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making a resistance, and took the money with a felonious intent, they should find him guilty. The jury having found accordingly, the judges, upon a case reserved, were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence he had committed was clearly a robbery. *Gascoigne's Case*, 1 Leach, 280; 2 East P. C. 709.

43. It appears that the prisoner and others, in the streets of Manchester, hung around the prosecutor's person and rifled him of his watch and money. It did not appear that any actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not vain. BAYLEY, J., on the trial of these parties for robbery, said, in order to constitute robbery, there must be either force or menaces. If several persons surround another, so as to take away his power of resistance, this is robbery. *Hughes' Case*, 1 Lew. C. C. 301.

44. It is no defence to a charge of robbery by threatening

to accuse a man of an unnatural crime, that he has in fact been guilty of such crime. Where the prisoner set up that defence, and stated that the prosecutor had voluntarily given him the money not to prosecute him for it, *LITLEDALE, J.*, said, that it was equally a robbery to obtain a man's money by a threat to accuse him of an infamous crime, whether the prosecutor were really guilty or not; as if he was guilty, the prisoner ought to have prosecuted him for it, and not to have extorted money from him; but if the money was given voluntarily, without any previous threat, the indictment could not be supported. The jury acquitted the prisoner. *Gardner's Case*, 1 C. & P. 479.

45. The prosecutrix, a servant maid, was inveigled into a mock auction, and the door was shut. There were about twenty persons present. Refusing to bid, she was told, "you must bid before you obtain your liberty again." She, however, again refused, and at length, alarmed by their importunities, she attempted to leave the shop. Being prevented, and conceiving that she could not gain her liberty without complying, she did bid, and the lot was knocked down to her. She again attempted to go, but the prisoner, who acted as master of the place, stopped her and told her if she had not the money, she must pay half a guinea in part, and leave a bundle she had with her. The prisoner, finding she would not comply, said, "Then you shall go to Bow-street, and from thence to Newgate, and be there imprisoned until you can raise the money." And he ordered the door to be guarded and a constable to be sent for. A pretended constable coming in, the prisoner, who had kept his hand on the girl's shoulder, said, "take her, constable, take her to Bow-street and thence to Newgate." The pretended constable said, "unless you give me a shilling you must go with me." During this conversation, the prisoner again laid one hand on the girl's shoulder and the other on her bundle, and while he thus held her, she put her hand into her pocket, took out a shilling, and gave it to the pretended constable, who said, "If Knewland (the prisoner) has a mind to release you, it is well, for I have nothing more to do with you," and she was then suffered to make her escape. She stated, upon oath,

that she was in bodily fear of going to prison, and that under that fear she parted with the shilling to the constable, as the means of obtaining her liberty ; but that she was not impressed by any fear, by the prisoner, Knewland, laying hold of her shoulder with one hand and her bundle with the other ; for that she had only parted with her money to avoid being carried to Bow-street, and thence to Newgate, and not out of fear or apprehension of any other personal force or violence. Upon a case reserved, the judges were of opinion that the circumstances of this case did not amount to robbery. After adverting to the cases of threats to accuse persons of unnatural offences, Mr. Justice ASHURST, delivering the resolution of the judges, thus proceeds : In the present case, the threat which the prisoners made was to take the prosecutor to Bow-street, and from thence to Newgate, a species of threat, which, in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery ; for it was only a threat to put her into the hands of the law, and an innocent person need not, in such circumstances, be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection and set her free. The terror arising from such a source cannot, therefore, be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress, for which the party injured may have a civil remedy by action, which could not be, if the fact amounted to felony. As to the circumstances affecting the other prisoner, (Wood, the pretended constable,) it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale-room, and detaining her until she gave the shilling ; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be completed without it. The judges, therefore, were all of opinion that however the prisoners might have been guilty of a *conspiracy* or other misdemeanor, they could not in any way be considered guilty of the crime of robbery. *Knewland's Case*, 2 Leach, 721.

CRIMINAL EVIDENCE.

Admissions, Declarations and Confessions.

1. Confessions made by a prisoner after threats and promises have ceased to operate, are admissible in evidence. *Peter v. The State*, 4 S. & M. 31.

2. The presumption is, that threats and promises continued to operate, which presumption may be rebutted by evidence. *Ib.*

3. Where a slave made confessions under the influence of threats, and "shortly after," the same day, was taken before a magistrate, where he made the same confessions, without being cautioned as to the effect of his replies to questions put to him, it was held, that his confessions made before the magistrate were inadmissible, having been made under the influence of threats. *Ib.*

4. On a trial for murder, a witness testified that he was some thirty or forty yards from the house when deceased was shot. On hearing the report of the pistol, he looked towards the house, and saw a person that he took to be the prisoner, run out, who ran a few paces, and turned and ran again into the house, and immediately ran out again and ran to where witness stood. He ran slowly and awkwardly, which induced witness to think that he was very drunk. When he came to witness, he seemed greatly agitated and troubled, and exclaimed, at the moment of coming up to him, that he would not have done it for the world. Witness further testified, that one minute would probably cover the time from the firing till the prisoner uttered the exclamation—two certainly would. It was held, that, under these circumstances, the exclamation of the prisoner was admissible as part of the *res gestæ*. *Mitchum v. The State*, 11 Geo. 615.

5. On an indictment for a misdemeanor, the declarations of the defendant were held admissible in evidence, where

they accompanied, explained and characterized the acts charged. *The State v. Huntly*, 3 Ired. 418.

6. Where the confession of a prisoner is offered in evidence in connection with some inducement held out to him to make it, if the confession is not so connected with the inducement as to be a consequence of it, it is to be considered as voluntary, and of course admissible. *State v. Potter*, 18 Conn. 166.

7. Where the uncle of the prisoner said to him, on the 10th of February, while he was in jail, "This is a sorrowful thing; the people don't think you are guilty, but that you know something about it; and if so, you had better tell all you know;" to which the prisoner replied, that he knew nothing about it. His uncle then said, "I think you do know something about it; the circumstances are very much against you." On the two succeeding days, he said that other persons were associated with him in the commission of the crime. On the 17th of February, the prisoner said to a witness, who had come to his cell at his request, that he was in such distress of mind that he could neither eat, drink or sleep, or get rest of any kind; that he could no longer be guilty of accusing innocent blood; that he alone was guilty of the murder in question, and wished the witness to go and call the counsel for the prosecution. They came to the prisoner's cell accordingly, and one of them inquired if he had sent for him; to which the prisoner replied, that he had, and wished to say to him that he alone was guilty of the murder. On being asked why he had accused others of a participation in the crime, he replied, that he had hoped, by accusing others, he might escape the extreme penalty of the law. On being inquired of if any one had held out to him any such inducement, he replied that no one had, but still he had a hope. He then proceeded to detail the particulars of the murder. Held, that the inducement held out to him by his uncle on the 10th had no efficiency in producing the confessions made on the 17th, and consequently they were voluntary and admissible. *Id.*

8. Confessions or disclosures, made under any threat, promise, or encouragement of any hope of favor, are inad-

missible in criminal prosecutions. *The State v. Phelps*, 11 Vt. 116.

9. Where a respondent was indicted for discharging a gun at a person, and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the respondent, it was held, that the respondent might prove the declarations of the witness, made while on his way to the place where the affray happened, the witness, upon being inquired of on cross-examination, having denied them. And *quere*, whether such declarations and the acts of the witness, while going to the place, might not be proved without inquiry on cross-examination, as showing the intent with which he went there. *State v. Goodrich*, 19 Vt. (4 Washb.) 116.

10. In such case, evidence might be proper of previous threats made by the witness as to the respondent, and of previous affrays between them, if so connected with the affray in question as to have any tendency to show that the respondent, at the time, had just cause of alarm, and to fear serious injury to his person or property. But where a case is so indefinitely stated upon the bill of exceptions as to leave it uncertain how far evidence offered was admissible, it will not be presumed that there was error in the court below in rejecting the evidence. *Id.*

11. In an action against several defendants for assault and battery, if the writ is not served on one, by reason of his death, his declarations and confessions are not admissible as evidence against his co-defendants. *Blackwell v. Davis*, 2 How. (Miss.) 812.

12. Where a sheriff said to his prisoner, "that it would be better, in the long run, for her to tell the truth about the matter, and not any lies," it was held, that this was not sufficient to exclude a confession made some fifteen minutes afterwards, on the ground that it was induced by flattery of hope. *Hawkins v. The State*, 7 Mis. 190.

13. Acts and declarations of an accomplice are evidence as a part of the *res gestæ* in the furtherance of the common design. *State v. George*, 7 Ired. 239.

14. To make such evidence admissible against a prisoner,

a conspiracy or common design between them must be established. *Ib.*

15. The rule that a prisoner's confessions are to be taken altogether, does not mean that the jury should give the same degree of credence to every part; they may well disregard such parts as are inconsistent with reason or other proof. *Bower v. The State*, 5 Mis. 364.

16. A magistrate told a prisoner on examination before him for larceny of a watch, that "unless he accounted for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing," and also warned him not to commit himself by his confessions. Held, that the statements of the prisoner, on his examination, were admissible, as his confession on a subsequent trial. *State v. Cowan*, 7 Ired. 239.

17. The voluntary and unbiased confession of a prisoner is sufficient, without other evidence, to authorize his conviction. *Ib.*

18. A voluntary confession is entitled to but little weight; and if it is contradicted by subsequent testimony under oath, it is for the jury to judge whether such statements under oath shall be disregarded on account of such discrepancies. *Keithler v. State*, 10 S. & M. 192.

19. On an indictment for murder, it appeared that when the prisoner was first arrested, one of the two special constables who had him in charge said to him: "Come, Jack, you might as well out with it," that the magistrate interposed and warned him not to confess; and that some hours afterwards the prisoner made confessions to B., who was in no position of authority over him, but with whom and in his buggy, as a convenient mode of transportation, he was riding to jail, the two constables being near, but not within hearing. Held, that the confessions to B. were admissible. *The State v. Vaigneur*, 5 Rich. 391.

20. Where a confession, in itself inadmissible, leads to the ascertainment of a fact admissible in evidence and material to the case, so much of such confession as relates strictly to the fact, may be received in evidence. *Ib.*

21. A statement under oath, made by the prisoner on his

examination as an ordinary witness, before he was charged with the crime, is admissible against him as evidence. *Ib.*

22. An officer, who had a prisoner in charge, told him he had better tell him all about the matter, and if he would, he would not appear against him, and that the prisoner had better turn state's evidence; whereupon the prisoner made a full confession to the officer. Held, that the confession so obtained could not be given in evidence against the prisoner, and that the proper time for objection was before the officer had given his testimony, and not during the instruction of the jury. *Couley v. The State*, 12 Mis. 462.

23. Where a common design is proven, the act of one, in furtherance of it, is evidence against his associates; but the declarations of one of the parties can be received only against himself. *The State v. Poll*, 1 Hawks, 442.

24. One who has committed an offence may be convicted upon his own voluntary confession, although it is not corroborated by any other proof. *Stephen v. The State*, 11 Geo. 225.

25. A confession, whether made upon an official examination or in conversation with private persons, is not admissible evidence, if it is obtained from a defendant, either by flattery or hope, or by the impressions of fear, however slightly the emotion may be implanted. *Ib.*

26. Wherever doubts may have been expressed in this country, the doctrine may be considered as satisfactorily established in England, that extra-judicial confessions, though uncorroborated by any other proof, as to the *corpus delicti*, are sufficient of themselves to convict the prisoner. *Ib.*

27. A confession or admission, by one under arrest on a criminal charge, to the officer having him in custody, made the day after the party had been told by the officer that "he could make him no promises, but if he made any disclosure that would be of benefit to the government, the officer would use his influence to have it go in his favor," is not admissible in evidence against such party; although the officer testified that he thought the statement was voluntary, and would have been made if the inducements of the day before had not been held out; and although the judge instructed the jury, that if the statement was not made freely and voluntarily, or

if it was induced by the previous promises, they should exclude it altogether. *Commonwealth v. Taylor*, 5 Cush. 605.

28. In an indictment for larceny, declarations at the time of his arrest, by the prisoner, as to his claim of ownership to the property taken, are not admissible in evidence. *The State v. Wisdom*, 8 Port. 511.

29. In an action for selling liquors without license, the declarations of the defendant that he had kept and would keep spirituous liquors for sale, although they did not immediately accompany the act of selling, as proved, are admissible in evidence. *New Gloucester v. Brigham*, 28 Maine, (15 Shep.) 60.

30. Two watchmen took K. into custody, and carried him to a watch-house, and one of them there said that K. had been robbing a man. R. soon came in, and pointed to K., and said, "that man has stolen my money." While one of the watchmen was proceeding to lock up K., B. saw K. put something on a shelf in the watch-house, and B. thereupon took from the shelf a bag of money, and R. said it was his bag, and that it was all the money he had. K. was within hearing of all that was said after he was carried to the watch-house, and made no reply to any part of it. Held, that on the trial of an indictment against K. for stealing R.'s bag and money from his person, the declarations of the watchmen and of R., to which K. made no reply, were not competent evidence of K.'s admission, either of the fact of stealing or that the bag and money were the property of R. *Commonwealth v. Kenney*, 12 Met. 235.

31. On a trial for rape, the prisoner cannot give in evidence his own declarations made at a time previous to the alleged crime, to prove that the woman was his concubine. *State v. Jefferson*, 6 Ired. 305.

32. Where the confession of a prisoner is given in evidence, the whole must go to the jury; but the whole is not necessarily to be taken as true. *Brown's Case*, 9 Leigh, 633.

33. It is no reason for the exclusion of a confession, as evidence against a prisoner, that it was made to an officer who had the prisoner in custody, provided that it was not induced by improper advantages taken of the situation in which

the prisoner stood. *Commonwealth v. Moster*, 4 Barr, 264.

34. The declarations of a prisoner cannot be given in evidence in his favor for the purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation put in evidence by the state. *Campbell v. The State*, 23 Ala. 44.

35. The prisoner's confession, that he had assisted to get another man's son out of jail, who would aid him in escaping, together with the fact that this man had come twice to the jail where the prisoner was confined, are admissible evidence against him. *Ib.*

36. On an indictment for bigamy, the defendant's admissions as to a former marriage, made while living with his first wife, may be given in evidence to prove the fact of such marriage. *Wolverton v. State*, 16 Ohio, 173.

37. On the trial of a criminal cause, a witness for the commonwealth proved, that having, in a conversation with the accused, expressed his entire conviction of a particular fact, the accused admitted the fact, (which, in its nature, strongly tended to establish his guilt,) but made an explanatory statement, (which, if taken as true, would exculpate him.) The accused then offered to prove that he had previously and under different circumstances made the same declaration to another person. Held, that such evidence was inadmissible. *Earhart's Case*, 9 Leigh, 671.

38. Where it is shown that a slave was arrested, tied and left by his master in charge of a third person, to whom he immediately after made a confession, proof that the master "had always been in the habit of tying his slaves when they were charged with any matter, and whipping them till they confessed the truth, and that he had frequently treated the prisoner in the same way," is competent, and should be considered by the court, in determining whether the confession was induced by the influence of hope or fear. *Spence v. The State*, 17 Ala. 192.

39. On the trial of an indictment against a free white citizen, the state may give in evidence the confessions of a negro, even when extorted by the pain of punishment, provided

they are proven by a white person, not as independent testimony, but as an inducement and in illustration of what was said and done by the accused, he being present, and consenting that the negro should tell all he knew. *Berry v. The State*, 10 Geo. 511.

40. Confessions, extorted by hope or fear, cannot be given in evidence against the prisoner, or any body else. *Ib.*

41. On the trial of an indictment for a felony, proof of declarations which showed the inception, in the mind of the prisoner, of a scheme of villainy, which was afterwards developed by the act done, for which he is on trial, is competent, notwithstanding the remoteness of the time when such declarations were made. *The State v. Ford*, 3 Strobl. 517, note.

42. Where a confession is obtained by a promise to put an end to a prosecution, such confession is inadmissible as evidence. *Boyd v. The State*, 2 Humph. 39.

43. A prisoner's confession will not be rejected as evidence, merely because it was made in answer to a question which assumed his guilt. Thus, where the officer who committed the prisoner on a charge of murder asked him, "whether, if it was to do over again, he would do it?" and the reply was, "Yes, sir-ree, Bob," it was held, that both question and answer were admissible in evidence, as well as the fact that, in making the reply, the prisoner's "manner was short." *Carroll v. The State*, 23 Ala. 28.

44. On the trial of an indictment for murder, a witness for the state, on his examination in chief, testified, that on the day on which the crime was charged to have been committed, he met the accused half a mile from his house, and that he had blood upon his hands, and upon cross-examination further stated, that the accused was coming from his own house at the time spoken of, and directed the witness' attention to the state of his hands. Held, that the witness could not be permitted also to state what the accused said when he showed him the blood on his hands. *Scuggs v. State*, 8 S. & M. 722.

45. It is a general rule, that the declarations of a party accused of a crime, made in his own favor, after the time of

the alleged commission of the crime, are not evidence for him. *The State v. Hildreth*, 9 Ired. 440.

46. The statements of a person wounded, made while the hurt is being examined, in explanation of the character of the injury causing his illness, are proper evidence, so far as they are necessary to give information on the subject; but the statement of the name of the person who inflicted the injury, or the instrument with which it was done, forms no part of such necessary information, and is inadmissible. *Denton v. The State*, 1 Swan, (Tenn.) 279.

47. A slave, after severe whipping, confessed her guilt of an attempt to poison, and subsequently confessed the crime, in answer to the question of her overseer, why she had committed the act. Held, that the answer to this question was not admissible evidence, as the question assumed the fact of her guilt, as previously admitted by her. *Quere*, would the subsequent confession of a slave, after a confession had been extorted, be evidence in any case? *State v. Clarissa*, 11 Ala. 57.

48. In a prosecution for a rape, the statements made by the female immediately after the transaction may be given in evidence to corroborate her testimony given in court. *Loughlin v. The State*, 18 Ohio, 99.

49. Whether the confessions of a prisoner shall be admitted in evidence against him, must depend upon the circumstances of each case. *United States v. Nott*, 1 M'Lean, 499.

50. Declarations which form a part of the *res gestæ* are admissible in evidence. *Kirby v. The State*, 7 Yerg. 259.

51. Where A. is charged with an assault upon B., with intent to kill, remarks or threats respecting A., made by B. to a third party before the assault, are not admissible in evidence in A.'s behalf; especially when it does not appear at what time they were communicated to him. *The State v. Jackson*, 17 Mis. (2 Bennett,) 544.

52. Declarations of B., some months after the assault, in palliation of A.'s guilt, are inadmissible. *Ib.*

53. Evidence of B.'s general bad and dangerous character is inadmissible, he being unoffending when assaulted. *Ib.*

54. Evidence of threats made by B. is inadmissible, if time enough had elapsed for the blood to cool. *Id.*

55. The prisoner was indicted for the willful murder of a new-born child. Her mistress told her "she had better speak the truth;" after which the prisoner made a confession. Held, that the mistress was not a person in authority within the rule which excludes confessions, her husband not being prosecutor, nor the offence in any way connected with the management of the house. *Regina v. Moore*, 12 Eng. Law and Eq. Rep. 583.

56. Where the evidence shows a concert of action between two parties, in relation to a homicide, the declarations and acts of one accomplice will be admitted to criminate the other. *Malone v. State of Georgia*, 8 Geo. 408.

57. What degree of influence will vitiate a confession? *The State v. Harman*, 3 Harringt. 567.

58. A voluntary confession, made by a person who has committed an offence, although not conclusive, is evidence against him, upon which he may be convicted, notwithstanding the confession is totally uncorroborated by other evidence. *Wheeling's Case*, 1 Leach, 311.

59. The commonwealth is not bound to accept an admission of defendant that the fact offered to be proved is true, but may go on to establish it by evidence. *Commonwealth v. Miller*, 3 Cush. 243.

60. Confessions ought always to be received with great caution, lest the language of the witness should be substituted for that of the accused. *Law v. Merrill*, 6 Wend. 268.

61. The confession of an infant is competent, but the jury should be careful in weighing it. *Mather v. Clark*, 2 Atk. 209.

62. A boy of twelve years and five months may be convicted on his own confession, and executed. Capacity to commit a crime necessarily supposes capacity to confess it. *State v. Guild*, 5 Halst. 163.

63. The case of a boy of twelve years, where it was left to the jury (the point being doubtful) to determine, as a matter of fact, whether the confession was voluntary. *State v.*

Aaron, 1 Southard, 231. The case of a boy ten years old. *Case of Stage et al.*, 5 Rogers' Rec. 177.

64. A confession is not admissible in evidence, unless it was made freely and voluntarily, and not under the influence of promises or threats. A confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape, when it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. *Warickshall's Case*, 1 Leach, 263.

65. So where the words were, "It would have been better if you had told at first." *Walkley's Case*, 6 C. & P. 175.

66. A statement made by the prisoner to a constable was received in evidence, and it was afterwards proved by another constable that the prisoner, on the night before he made the statement, said that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter; CRESSWELL, J., struck the statement so received from his notes. *Boswell's Case*, 1 Carr. & M. 584.

67. The prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if W. H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. The mistress then said, "Pray tell me if you did it?" The prisoner then confessed. The point being reserved, the judges thought the confession ought not to have been received. *Upchurch's Case*, 1 Moody, (C. C.) 465.

68. On the examination of the prisoner before the committing magistrate, upon a charge of felony, the magistrate's clerk told him not to say any thing to prejudice himself, as what he said would be taken down, "and used for him or against him at his trial." COLERIDGE, J., ruled that this was an inducement to the prisoner to make a confession, held out by a person in authority, and that the prisoner's statement,

which had been taken down and signed, could not be received in evidence. *Drew's Case*, 8 C. & P. 140.

69. A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner that if she did not tell the truth about the things found in the pump, he would tell the constable to take her; but he said nothing to her respecting the fire. *COLTMAN, J.*, held, that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. *Ann Hearn's Case*, 1 Carr. & M. 109.

70. A confession, made under representation of the infamy which would attend the concealment, made in great agitation, but without threats or promises, is admissible. *State v. Crank*, 2 Bailey, 66.

71. On the trial of an indictment to exclude confessions of guilt of the accused, on the ground of their not having been voluntarily made, there must appear to have been held out some fear of personal injury or hope of personal benefit of a temporal nature, unless the collateral inducement be so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession. *State v. Grant*, 22 Maine, 171.

72. Although a confession, made under the influence of a promise or threat, is inadmissible, there are yet many cases in which it has been held, that notwithstanding such threat or promise may have been made use of, the confession is to be received, if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence, upon the mind of the party. *Moore v. The Commonwealth*, 2 Leigh, 701.

73. The presumption is, that the influence of the threats or promises continues. *State v. Guild*, 5 Halst. 163.

74. On the trial of an indictment for larceny, it appeared that the owner of the goods, on the prisoner's expressing contrition for the offence, promised not to prosecute him; but

the officer, whom they soon met, told them the matter could not be settled, and immediately arrested the prisoner. Held, that the prisoner's confessions, made afterwards, were admissible in evidence against him, notwithstanding the previous promise of the owner. *Ward v. The People*, 3 Hill, 395.

75. A confession is only evidence against the party himself who made it, and cannot be used against others. *Tong's Case*, Kelly, 18 ; Gilb. Ev. 137.

76. In an indictment against A. for concealing a horse thief, it is not competent to give evidence of what the alleged horse thief has confessed in the presence of A., to establish the fact that a horse was stolen. *Morrison v. The State*, 5 Ohio, 539.

77. Where there is a joint presentment of two defendants for adultery, the admissions of either party are evidence against the one making them, but not against the other. *Frost v. The Commonwealth*, 9 B. Mon. 362.

78. In criminal, as well as in civil cases, the whole of an admission made by a party is to be given in evidence, unless its improbability renders it necessary that the defendant should prove what he asserts in avoidance of a conceded fact. *Newman v. Bragley*, 1 Dall. 340.

79. The jury may believe part and disbelieve part. *Fox v. Lambson*, 3 Halst. 275.

80. If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation ; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit ; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. *Queen's Case*, 2 Brod. & Bing. 297.

81. The rule does not exclude a confession where only part of what the defendant said has been overheard. *State v. Covington*, 2 Bailey, 569.

82. If a prisoner, in speaking of the testimony of one who had testified against him, says, that "what he said was true so far as he went, but he did not say all or enough," this is not admissible as a confession, nor does it warrant proof to the jury of what the witness did swear to. *Finn v. The Commonwealth*, 5 Rand. 701.

83. A party whose admissions or confessions are resorted to as evidence against him, has, in general, a right to insist that the whole shall be taken together; but the part culled out by him should relate to the point or fact inquired into on the other side. *Kelsey v. Bush*, 2 Hill, 440.

84. It must not be supposed that every part of a confession is entitled to equal credit. A jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. Thus, in a case similar to that before Mr. Baron GARROW, the prosecutor having put in the prisoner's examination, which merely stated that "the cloth was honestly bought and paid for," Mr. Justice PARKE told the jury, "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *Higgin's Case*, 3 C. & P. 603.

85. Where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, LITLEDALE, J., left the confession to the jury, saying, "It must be taken altogether, and it is evidence for the prisoner as well as against him; still, the jury may, if they think proper, believe one part of it and disbelieve another. *Clewes' Case*, 4 C. & P. 225.

86. In a recent trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates as their defence, and show by evidence that they were not consistent with truth. *Greenacre's Case*, 8 C. & P. 36.

87. Courts which go against the necessity of corroborating circumstances, yet agree that the *corpus delicti* must be

proved by other evidence in order to render the confession operative. Thus, in larceny, other proof must be given of the taking of the goods, or in murder, the fact of death. *State v. Guild*, 5 Halst. 185.

88. Confessions by infants are competent as well as those of adults. *Rex v. Thornton*, Ry. & Mo. 27.

89. He who is a rational moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts. If, therefore, the prisoner be of an age to be punished, he was of an age to confess his guilt. *Aaron's Case*, 1 South. 246.

90. The oral confession to a private person may be received, though the prisoner be examined judicially before a magistrate, who puts his examination in writing. 1 Macnally's Ev. 45.

91. On trial for manslaughter, the state read the written confession of the prisoner made before the magistrate, and then offered evidence of his conversations on other occasions than the examination. This was objected to, but admitted; and held well. Otherwise, if a criminal had twenty times acknowledged the commission of a fact, and should afterwards refuse to confess it upon an examination before the justice, for the very purpose of preventing any proof of his former acknowledgments, he would, by his own acts, defeat the ends of justice. *State v. Wells*, Coxe, 424, 429.

92. Where primary evidence cannot be obtained, as by the production of counterfeit money, the confession may be used as secondary evidence of its contents. A confession of the prisoner was accordingly received that he had counterfeited guineas, though the guineas were not produced, being out of the power of the prosecution. *The State v. Phelps*, 2 Root, 87.

93. Where, on a stolen bank bill being found on the prisoner, the prosecutor observed, "Unless you give a more satisfactory account, you shall be taken before a magistrate;" and the prisoner then confessed having stolen the bill; the court were of opinion that this amounted to a threat to prosecute, and therefore the confession was inadmissible. They said he understood that his confession would save him from being

taken before a magistrate. *Rex v. Thompson*, 1 Leach, 291.

94. While the prisoner was in custody on a charge of burglary, he said to the officer having him in charge, "If you will give me a glass of gin, I will tell you all about it." The officer gave him two glasses of gin, and he made a confession of his guilt. But this was held inadmissible. Nor would the court allow a subsequent confession before the magistrate to be read, the manner of the first confession not appearing to him, and he, of course, having taken no pains to remove its influence. *Rex v. Sexton*, 6 Peters, 83.

95. The captain of a vessel said to one of his sailors, suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face;" on which the sailor confessed. Held not admissible against him. *Rex v. Parratt*, 4 Carr. & Payne, 570.

96. So where a man said to an accused boy, "if you confess you will probably get clear." *State v. Guild*, 5 Halst. 163, 167.

97. So where, in the presence of a prosecutor, one stranger told the prisoner if he would confess, being in custody, his confession could not be used against him; and another stranger told him, that being young, if he would confess it would be more to his credit. *State v. Roberts*, 1 Dev. 259.

98. So where the surgeon said to a girl, who was charged with administering poison with intent to murder, "You are under suspicion of this, and you had better tell all you know." *Rex v. Kingston*, 4 Carr. & Payne, 387.

99. So where the prosecutor said to the prisoner, on his apprehension, "he only wanted the money, and if the prisoner gave him that, he might go the devil;" in consequence of which the prisoner said, on delivering part, that it "was all he had left;" a majority of the judges held such evidence not receivable. *Rex v. Jones*, C. C. M. & R. 152.

100. On a criminal trial, it is no objection to proving a confession of the defendant, that it was made when he was under oath, if it appear that it was free and voluntary,

and not made under the influence of fear or hope. *The People v. Hendrickson*, Parker's Cr. 406.

101. A prisoner's confession, not made to one in authority, nor in consequence of inducements held out by any one in authority, is admissible in evidence, although a conversation had previously been held by two private persons with the prisoner, in the presence of the jailor, (conceding him to be one in authority,) in which conversation the effect of a confession was discussed. *State v. Kirby*, 1 Strobb. 378.

102. In an indictment for larceny, for the purpose of proving a bargain and sale, the declarations thereto at the time are a part of the *res gestæ*, and competent evidence for the accused to rebut the inference of guilt arising from the possession of stolen property. *Leggett v. State*, 15 Ohio, 283.

103. Although a witness may testify that the prisoner's confessions were made under threats, the court may inquire what those threats were, in order to ascertain their sufficiency in law, to exclude the confessions. *Whaley v. The State*, 11 Geo. 123.

104. Such confessions of the accused alone as have been voluntarily made, uninfluenced by either hope or fear, can be given in evidence against him ; but they must be shown to have been thus made before they can be received. *State v. Nelson*, 3 An. 497.

105. The fact that the accused was in the stocks at the time that a confession of guilt was made by him, in which he had been placed merely for safe-keeping, will not render the confession inadmissible. Where the restraint is such only as is necessary for the safe-keeping of the prisoner, it will not render his confession inadmissible. *Id.*

106. Where a slave in confinement, under a charge of murder, on a representation made to him by the overseer of the estate, a son of his master, "that it would be better for him to tell what he had done," confesses the crime, the confession cannot be given in evidence against him. *Id.*

107. Although opposite opinions have been entertained as to the question whether a confession made to a person who has no authority over the prisoner, upon an inducement

offered by that person, be admissible, it seems to be settled that if the inducement be offered by a master to a servant, or by any other person having authority over the prisoner, the confession will not be deemed voluntary, and will be rejected. *Id.*

108. Where one of the company engaged in the apprehension of a prisoner, in the presence of the officer and the prosecutor, held out promises of benefit to him, under the influence of which he made a confession, it was held, that such confession was not admissible in evidence. *Morehead v. The State*, 9 Humph. 635.

109. After the fact is known, that either the influence of hope or fear existed, inducing a confession, explicit warning must be given the prisoner of the consequences of a confession; and it must also be clear that he understood such warning, before his confessions are admissible in evidence. *Van Buren v. The State*, 24 Miss. 512.

110. Where the declarations of a prisoner are given in evidence, the jury ought to take the whole into consideration, and may reject those in his favor and believe those which tend against him. *Green v. State*, 13 Mis. 382.

111. A prisoner's examination cannot be admitted in evidence against him. *State v. Pierce*, 2 M. 253.

112. Parol testimony is inadmissible, of the prisoner's declaration before a magistrate. *State v. Rodriguez*, 2 M. 255.

113. Evidence of confession alone, unsupported by corroborating facts and circumstances, is not sufficient to convict. There must be proof *aliunde* of the *corpus delicti*, although such proof need not be conclusive. 16 Wend. 53.

114. To exclude a confession made under the influence of a promise or threat, the promise and threat must be of a description which, it may be presumed, would have such an effect on the defendant's mind as to induce him to confess. 4 Carr. & Payne, 543.

115. The confessions of a principal officer, made long after his term of office has expired, are not evidence against his sureties in a suit on his official bond. *Commonwealth v. Brassfield*, 7 B. Mon. 447.

116. A slave's voluntary confessions of guilt are admissible evidence against him. The facts that he is a slave, and ignorant, and to some extent unacquainted with the consequences which may attend the making of such confessions, do not affect the admissibility of the evidence, but should be considered by the jury, in connection with the admissions, in ascertaining the weight to be given to them. *Seaborn v. The State*, 20 Ala. 15.

117. The confession of a person, obtained on a threat of a civil suit for property stolen, is admissible in a criminal prosecution for the larceny. *Cropper v. United States*, 1 Morris, 259.

118. "As the human mind, under the pressure of calamity, is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from the defendant either by the flattery of hope or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawk. 595.

119. If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the judge will not direct an acquittal, as if the jury may believe one part of the confession and disbelieve another. However, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. *Rex v. Clewes*, 4 Carr. & Payne, 221.

120. A witness, in giving a conversation with a prisoner, though others are named and implicated in the same conversation, must give the whole, including the names, exactly as it occurred, and if the other persons are on trial, and cannot be affected by it, it is for the judge to tell the jury so. *Rex v. Hearne*, 4 Carr. & Payne, 215.

121. Where the confession is made to the district attorney, and by him reduced to writing, he may, notwithstanding,

give parol evidence of it. The writing being a mere memorandum, need not be produced. *Patton v. Freeman et al.*, Coxe, 113.

122. The confessions of a slave accused of a crime, made under the influence of threats or violence, are inadmissible in evidence to establish his guilt. *State v. Gilbert*, 2 An. 245.

123. When confessions of guilt are given in evidence, the whole must be taken together. *State v. Isaac*, 3 An. 359.

124. So, where a witness offered to prove a confession by the prisoner, states "that the accused told him that he had killed the deceased, and commenced justifying the act, when witness stopped him," the confession will not be allowed to go to the jury, he having been deprived of the benefit of the explanations with which he intended to accompany it, and which, if made, would have been admissible in evidence. *Id.*

125. Declarations are admitted in evidence as part of the *res gestæ* only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences. *Scuggs v. State*, 8 S. & M. 722.

126. A police constable, who apprehended the prisoner, having told him the nature of the charge, said, "he need not say any thing to criminate himself; what he did say would be taken down and used as evidence against him;" and the prisoner thereupon made a confession. Held, that the confession was receivable in evidence. *Regina v. Baldry*, 12 Eng. Law and Eq. Rep. 590.

127. The confessions of a party, unsustained by collateral circumstances, are not competent proof of the fact of adultery. *Sheffield v. Sheffield*, 2 Texas, 79.

128. Where a confession was improperly obtained, both it and evidence of acts done by the prisoner in consequence, towards discovering the property, were held inadmissible. *Russ. & Ry. (C. C.)* 492.

129. Where confession was offered to be proved, the court permitted the evidence thus offered to be interrupted for the purpose of showing that a previous confession, by which it was induced, was unduly obtained. *Commonwealth v. Harman*, 4 Barr, 269.

130. A prisoner, charged with homicide, was taken before a committing magistrate, and there sworn to tell the truth, and told, "If you do not tell the truth, I will commit you." Held, that a confession thus exacted was inadmissible on the trial as evidence against the prisoner. *Ib.*

131. Where a previous confession is unduly obtained, any subsequent confession, given on its basis, is inadmissible. *Ib.*

132. The evidence elicited upon the examination by a committing magistrate of a prisoner, under oath, as to the subject-matter of his offence, is, it seems, inadmissible. *Ib.*

133. The original confession may have been obtained by improper means, subsequent confessions of the same or like facts may be admitted, if the court believe, from the length of time intervening, from proper warning or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. 4 Halst. 163.

134. On the trial of a party indicted for stealing from the person of another, his admissions are not secondary evidence, and are not to be excluded on that ground, although the person, from whom the property is alleged to have been stolen, is not examined as a witness. *Commonwealth v. Kenney*, 12 Met. 235.

135. In a prosecution for rape, the declarations made by the injured female as to the transaction, immediately after the offence was committed, may be given in evidence to sustain her testimony given in court, but not as substantive testimony to prove the commission of the offence. *Johnson v. State*, 17 Ohio, 593.

136. In an indictment charging a father with living in adultery with his daughter, his confession that she is his daughter are admissible in evidence. *Morgan v. State*, 11 Ala. 289.

137. If a man, through promise of favor, confess that stolen goods are in such a room in his house, and they are, in consequence, found there, although such a confession cannot be received, yet it may be proved that in consequence of something which the witness heard from the defendant, he found the goods in the defendant's house. 9 Pick. 496.

138. When, after due warning of all the consequences, and sufficient time allowed for mature reflection, a prisoner makes confession of his guilt to a private person, having no control over the prisoner or the prosecution, although he may have influence and ability to aid him, such confession is properly allowed as evidence for the jury. *State v. Kirby*, 1 Strobh. 155.

139. It is no objection to the competency of confessions that they were made while the party was legally imprisoned. *Stephen v. The State*, 11 Geo. 225.

140. On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used, in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *The Commonwealth v. Kent*, 6 Met. 221.

141. In all cases, the *whole* of the confession should be given in evidence; for it is a general rule that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving, at the same time, his contemporaneous assertion of a fact favorable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 Taunt. 245.

142. The confessions of an accomplice in a felony, made after the commission of the offence, and not in the presence of the prisoner, though a conspiracy be proven, are inadmissible, except as against the accomplice. *Hunter v Commonwealth*, 7 Gratt. 641.

143. A confession obtained by temporal inducement, by threat or by a promise or hope of favor, having some reference to the party's escape from the charge, held out by a person in authority, a magistrate, sheriff, constable, master or mistress, is inadmissible. *The State v. Bostick*, 4 Harringt. 563.

144. On the trial of an indictment for a riotous assault

upon an officer while serving a legal precept on A., who was charged with larceny in another state, and with being a fugitive from justice, the defendants cannot introduce evidence that B., who claimed the custody of A. as a fugitive slave, had declared, and that the officer knew B. had declared that A. had not committed larceny, and that the charge was made merely for the purpose of getting A. into his custody, so that he might the more easily be carried home. *The Commonwealth v. Tracy*, 5 Met. 536.

145. Upon a joint indictment against husband and wife, the declarations of the wife are admissible in evidence against her, but not against her husband. *Commonwealth v. Briggs*, 5 Pick. 429.

146. Where a witness, examined before a grand jury, in examining a certain offence, is afterwards indicted for that particular offence, his testimony before the grand jury may be given in evidence against him. *State v. Broughton*, 7 Ired. 96.

147. The prisoner, after his arrest, upon being interrogated why he had killed his wife, replied, "Because I loved her;" and said further, "I killed her because she loved another better than me." He also said to a fellow prisoner in jail, that "he had killed her, but if it was to do again, he would not do it." Held, that there was nothing, under the circumstances in which these admissions were made, to make them inadmissible. *The State v. Freeman*, 1 Speers, 57.

148. On a trial for murder, proof that the deceased, in the absence of the prisoner, and twenty-five or thirty minutes after the affray, upon being interrogated as to the cause of his illness, stated that the prisoner "had hit him in the belly, had bursted him open with a chair," is admissible in evidence, the declaration forming no part of the *res gestæ*. *Denton v. The State*, 1 Swan, (Tenn.) 279.

149. Declarations of a witness, on a former occasion, respecting the guilt of a prisoner on trial, are not admissible in evidence to show the guilt of the prisoner. *Fanny v. The State*, 6 Mis. 121.

150. Two brothers, F. and J., were under indictment for murder, and a third brother, P., said to F., "J. has deter-

mined to make a confession, and we want your consent;" F. said he thought it hard that J. should have the advantage of making a confession, since the thing was done for his benefit. P. said, "If J. is convicted there will be no chance for him, but if you are convicted, you may have some chance for procuring a pardon;" and P. then asked the witness if he did not think so. The witness said he did not know; he was unwilling to hold out any improper encouragement. Held, that the assent would be evidence of F.'s guilt; that a hope of favor was held out to induce him to give his assent; and that all subsequent confessions at the same interview should be excluded, as being made under the same influence. *Commonwealth v. Knapp*, 9 Pick. 496.

151. But it appearing afterwards that the proposition had no influence on F., as he neither assented nor dissented, his confessions were admitted. *Ib.*

152. Upon the trial of a principal, in the second degree, it is competent for the government to offer in evidence, an admission of his own guilt made by the principal in the first degree, to establish the fact of such guilt, in addition to the record of his conviction. *Studstill v. The State of Georgia*, 7 Geo. 2.

153. Where confessions have been procured through hope or fear, subsequent confessions will be presumed to proceed from the same influence, until the contrary appears; and such confessions, until the presumption is removed, are not admissible. *The State v. Roberts*, 1 Dev. 259.

154. Confessions of guilt, obtained by promises of favor, are not admissible in evidence. *Commonwealth v. Chabcock*, 1 Mass. 144.

155. The voluntary confessions of a criminal are admissible in evidence against him. *Commonwealth v. Drake*, 15 Mass. 161.

156. And that, too, even though those confessions were penitential confessions, made by one member to another member of the same church. *Ib.*

157. Where an accomplice was promised by the attorney general, that if he would testify, he should not be prosecuted, and he promised to testify and made a full disclosure, but af-

terwards refused to testify, his confession was received as evidence against him. So would be the confessions of a prisoner, while he is persuading any one to use their influence to have him examined against his associates. *Commonwealth v. Knapp*, 10 Pick. 477, 489-495.

158. A prisoner being arrested for burglary, was told by a stranger, in presence of the prosecutor, that being in custody, his confession could not be used as evidence against him; and another stranger told him that being young, if he would confess, it would be more to his credit. He accordingly confessed; and two or three days after, there being then no immediate influence exercised, he made a fuller confession. Both held inadmissible, though corroborated by circumstances, as the latter might have been made under the first influence. This shall be presumed to continue till palpably done away. *State v. Roberts*, 1 Dev. 259.

159. A confession made before the police clerk, after a threat to the prisoner by one of the marshals while bringing her to the office, that if she did not tell all she knew, she would be put into the dark room and hanged, was rejected. *People v. Rankin*, 2 Wheel. C. C. 468.

160. Acknowledgments of a principal are evidence against a surety, unless there is proof of combination. *Commonwealth v. Kendig*, 2 Barr, 448.

161. The declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is admissible in evidence, after her death, as a part of the *res gestæ*. *The Commonwealth v. M'Pike*, 3 Cush. 181.

162. By the laws of North Carolina, the admissions of a sheriff are admissible, both in actions against himself and against his sureties. *The State v. Woodside*, 8 Ired. 104.

163. The declarations of the assignor of an account, made after the assignment, are incompetent to prove errors in the account. *The State v. Jennings*, 5 Eng. 428.

164. The entire confessions and statements of a party must be given to the jury as they were made, but the jury may

believe a portion and disregard the rest of such confessions and statements. *Coon v. The State*, 13 S. & M. 246; *McCann v. The State*, 13 S. & M. 471.

165. If evidence is demurred to, or otherwise taken from the jury, for the decision of the court, all the facts which it had a tendency to prove must be regarded as admitted by the objecting party; and the court will then decide upon the legal effect only of the facts thus established, proved, admitted or inferred, and not upon the sufficiency of proof to establish those facts. *Franks v. The State*, 1 Iowa, (Greene,) 541.

166. The admission of certain facts by the principal obligor, in which facts he and his sureties were jointly interested, is admissible evidence against them all. *Parker v. The State*, 8 Blackf. 292.

167. Statements made by one party to the authorized agent of the other, relative to a matter in controversy, and not disputed or denied by the agent, are evidence in the cause. *The State v. Farish*, 23 Miss. (1 Cush.) 483.

168. Upon a trial of an indictment for larceny, the stolen goods being traced to the possession of the defendant, evidence of his declarations, as to how they came into his possession, is inadmissible. *The State v. Slack*, 1 Bailey, 330.

169. The act or statement of an agent in reference to the business in which he is at the time employed, and which is within the scope of his authority, is the act or statement of the principal, and may be proved, either in a criminal or civil case, in like manner as if the evidence applied to the principal. *American Fur Co. v. The United States*, 2 Pet. 358.

170. The declarations of the accused, made after the commission of the act with which he stands charged, where they form no part of the *res gestæ*, are not admissible in his favor as original, independent testimony. *Oliver v. The State*, 17 Ala. 587.

171. A statement made by another person of a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him as an implied admission on his part of its truth,

unless it was of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it. *Lawson v. The State*, 20 Ala. 65.

172. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements. *Ib.*

173. Torture, to extort confession, is indictable at common law. *The State v. Hobbs*, 2 Tyler, 380.

174. In capital cases, evidence of confession, though admissible, is yet received with great distrust. *The State v. Fields*, Peck, 140.

175. Confessions, not extorted by hope or fear, are admissible evidence at the trial of a prisoner. *The State v. Crank*, 2 Bailey, 66.

176. The confessions of a prisoner, extorted by pain, or made under the influence of hope or fear, are not admissible in evidence against him. *Hector v. The State*, 2 Mis. 165.

177. The confessions of a party, made to an individual, not in open court or before a magistrate, and not corroborated by circumstances, will not justify a conviction. *People v. Hennessy*, 15 Wend. 147.

178. The confession of a prisoner should go to the jury. If obtained by fear or flattery, they will be instructed not to convict unless it be corroborated by other testimony. *State v. Jenkins*, 2 Tyler, 377.

179. A confession in a criminal case must be taken altogether. The jury may not take a part of a confession as true and reject the other parts, which make in favor of the defendant. *Tipton v. The State*, Peck, 308.

180. Admissions of a prisoner, though not in writing or given in his words, are admissible; but the whole connected conversation on the subject must be given. *United States v. Wilson*, 1 Bald. 78.

181. Where a confession of a capital crime was voluntarily made by a prisoner, it was left for the jury to determine, on the trial, whether the prisoner had falsely declared himself guilty or not. *Commonwealth v. Dillon*, 4 Dall. 116.

182. A confession of mayhem, before a justice of the peace, is admissible in evidence. *State v. Irwin*, 1 Hayw. 112.

183. Where once a confession under influence has been obtained, a presumption arises that a subsequent confession, of the same nature, flows from the like influence, and such presumption must be overcome before the confession can be given in evidence. *State v. Guild*, 5 Halst. 163.

184. A verbal confession of guilt, made by a person accused of a crime, if induced by a delusive hope of impunity excited in his mind, will not be received in evidence; and a written examination of the accused, made by a justice, within a few hours after the verbal confession, will also be inadmissible, upon the presumption that the same inducement which operated upon his mind at the time he made his verbal confession, might have continued to operate at the time of the written examination. *Ib.*

185. Where the acts done are not sufficient to make out a criminal charge, conversation or confession extorted by fear or hope, cannot be received so as to couple it with those acts in order to make out the proof. *The State v. Dougherty*, 2 Overt. 80.

186. If the commonwealth gives evidence of a prisoner's confessions, in the examining court, but declines giving them on his trial, the prisoner cannot be allowed to give evidence of what the commonwealth proved in the examining courts touching those confessions. *Mendum v. Commonwealth*, 6 Rand. 704.

187. On the trial of an indictment for murder, declarations of the prisoner, antecedent to the murder, were held admissible, where they tended to explain and reconcile his conduct. *State v. Rigely*, 2 Har. & McHen. 120.

188. But declarations of the deceased, antecedent to the stroke which occasioned his death, were held inadmissible. *Ib.*

189. Evidence of what the prisoner said to a witness, in

urging the witness to use his influence that he might be permitted to testify against his associates, is admissible against the prisoner. *State v. Thompson*, Kirby, 345.

190. Evidence of confessions alone, unsupported by corroborating facts and circumstances, is not sufficient to convict; there must be proof *aliunde* of the *corpus delicti*, though it need not be conclusive. *People v. Badgley*, 16 Wend. 53.

191. Where the court instructed the jury, that certain confessions of the prisoners, reduced to writing, and not produced on the trial, ought to be disregarded by the jury, although they came out upon direct interrogatories of the cross-examining counsel for defence, it was held, that if there was any error in the instruction, it was favorable to the prisoners, and that the suppression of the evidence afforded no presumption of law, but of fact only, in the case. *United States v. Gilbert*, 2 Sumner, 19.

192. If the persons who made the confessions were not identified, but the testimony was only that *some* did confess, not being named or identified, such confessions, it was held, could not be applied to any particular prisoner as proof of his guilt, but might be considered by the jury, so far as they applied to the subject-matter. *Ib.*

193. The voluntary confessions of a person are evidence against himself, but not against third persons. Thus, in an indictment for concealing a horse thief, knowing him to be such, the confessions of the alleged thief, in presence of the defendant, are not admissible to show that a horse was stolen. *Morrison v. State*, 5 Ham. 438.

194. To make the action and declarations of a conspirator, in furtherance of the common object, admissible in evidence against a co-conspirator, it is sufficient that the conspiracy has been proved by a competent witness. The court will not decide on his credibility. *Commonwealth v. Crowninshield*, 10 Pick. 497.

195. Admissions made to a clergyman may be received in evidence, in a criminal case, if not made to him in his professional character, in the course of discipline enjoined by the church. *People v. Gates*, 13 Wend. 311.

196. In Connecticut, communications to the state's attorney,

by a prisoner, are confidential, and the attorney will not be admitted to testify to them. *State v. Phelps*, Kirby, 282.

197. Acknowledgments of a principal are evidence against the surety, unless there is proof of combination. *Commonwealth v. Kendig*, 2 Barr, 448.

198. Confessions, induced by appliances of hope or fear, may not be given in evidence; but if facts are obtained by such confessions, they may be given in evidence. *Gates v. The People*, 14 Ill. 433.

199. A declaration, of a character proper for a slave to make, made by him in the presence and hearing of a white person, from whom it naturally called for a response, is admissible evidence against such white person, if uncontradicted by him, as showing acquiescence in the truth of the statement. *Spencer v. The State*, 20 Ala. 24.

Best and Secondary Evidence.

1. It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of higher in existence, and which may be had, shall not be admitted. *Commonwealth v. Kinison*, 4 Mass. 646.

2. But this rule does not mean that all the evidence which exists in the case shall be produced, but merely that a fact shall not be inferred from any evidence, when more direct and conclusive evidence of the fact may be had. *Commonwealth v. Janes*, 1 Pick. 375; *Commonwealth v. Kinison*, 4 Mass. 646.

3. The words of the Revised Statutes, c. 47, § 3, that no person shall presume to be a retailer or seller of spirits in a less quantity than twenty-eight gallons, unless he is first licensed as a retailer, being general, it is not competent for a party indicted for selling contrary to the statute to prove that the spirits was bought of him to be used as a medicine, unless he claims to be a druggist. *Commonwealth v. Kimball*, 24 Pick. 366.

4. A joint resolution, which imposes a particular duty upon any officer of the state, is a public statute of which the

courts must take judicial notice. *The State v. Delesdenier*, 7 Texas, 76.

5. The courts of Georgia will take judicial notice of the customary abbreviations of Christian names. *Stephen v. The State*, 11 Geo. 225.

6. The courts are bound to know judicially, who are the sheriffs of the several counties in the state. *The State v. Ingram*, 27 Ala. 17.

7. Upon an indictment against a miller, charged with having stolen a certain portion of barilla intrusted to him to grind, and where he had adulterated the rest, it was held, that the government was not bound to produce the truckman who carried the barilla to and from the mill, to prove that the barilla was not adulterated in the transportation, although there was only circumstantial evidence that it was adulterated by the miller. *Commonwealth v. James*, 1 Pick. 375.

8. If a forged instrument, on which an indictment is pending, has been lost, evidence may be given of its contents. *Commonwealth v. Snell*, 3 Mass. 82.

9. And that, too, without proving that its non-production is owing to the fault or fraud of the party charged with the forgery. *Ib.*

10. Courts take judicial notice of the civil decisions of the state. *The People v. Bresse*, 7 Cowen, 429.

11. Secondary proof of the contents of a letter of appointment cannot be received in evidence to establish the agency of a government agent, without first accounting for the non-production of the original. *United States v. Boyd*, 5 How. (U. S.) 29.

12. The rule requiring the production of the best evidence is applied to reject secondary evidence, which leaves that of a higher nature behind, in the power of the party; it is not applied to reject one of several eye-witnesses to the same fact. *United States v. Gilbert*, 2 Sumner, 19.

13. The best evidence which the nature of the case admits should be produced; therefore, in a trial under an indictment for uttering a forged bank note, an officer of the bank ought to be examined. *The State v. Petty*, Harper, 59.

14. Proof of the contents of a writing cannot be received unless it be shown that the writing cannot be produced. *United States v. Porter*, 3 Day, 283.

15. The officers of the bank are not the only competent witnesses to prove a bank note to be forged, although, if absent, their absence should be accounted for. *The State v. Hooper*, 2 Bailey, 37; *The State v. Tutt*, 2 Bailey, 44.

16. Other persons are not incompetent, although the testimony of the officer might have been had by proper diligence. *The State v. Anderson*, 2 Bailey, 565.

17. A teller in a bank is competent to testify as to the handwriting of the president and cashier, although such officers are not incompetent by reason of interest; it cannot be considered as secondary evidence. *Hess v. State*, 5 Ham. 5.

18. On an indictment for uttering a counterfeit bank bill, where the bank was out of the state, although within forty miles of the place of trial, the forgery was allowed to be proved by two witnesses, who had very frequently received and paid out bills purporting to be made by such bank, and one of whom had carried a large number of such bills to the bank, which were all paid by the bank as genuine, but neither of whom had ever seen the president or cashier write. *Commonwealth v. Carey*, 2 Pick. 47.

19. A copy of a policy of insurance, proved to have been compared with the original register on the books of the insurance company and notice given to produce the original, cannot be read in evidence; the register in the hands of the company should be exhibited, after proving the existence of the original policy. *United States v. Sherman*, Pet. C. C. 98.

20. The question in an action of trespass, *de bonis asportatis*, brought by A. against B., was as to the consideration and *bona fides* of a sale of goods from C. to A. A. claimed that consideration was a debt due by note to her from a corporation, which C. had received of her, promising to account with her for it, and offered D. to testify that he had seen, on the note-book of the company, kept by C., as their agent, and from time to time exhibited to them, an entry of such note, particularly describing it. It was held, that the testi-

mony of A., and the books themselves, were inadmissible, the former being in the nature of hearsay, and going to show the contents of a writing, and the latter not evidence against third persons. *Treat v. Barber*, 7 Conn. 274.

21. Where the defendant, in such action, to repel the proof of consideration adduced by the plaintiff, offered evidence to prove that a considerable note and mortgage had been given by C. to the plaintiff, after the time when, as she claimed the debt from which the goods were sold, accrued, and before such sale, it was held, that such evidence was admissible, as having a bearing on the matter in issue. *Ib.*

22. On an indictment for perjury, the testimony of the person by whom the oath was administered is admitted, to show that he was an acting magistrate. His testimony is also sufficient, in connection with the original certificate of the administration of the oath, to show that the oath was administered by him to the respondent, without the production of a copy of the record. *State v. Hascall*, 6 N. H. 352.

23. Where the subscribing witness to a deed or other instrument is out of the jurisdiction of the court, proof of his handwriting is sufficient evidence of the execution of the instrument, without any proof of the handwriting of the parties therein named. *The People v. Rowland*, 5 Barb. Sup. Ct. 449.

24. The declarations of a subscribing witness in respect to his place of residence, are competent evidence to show that he is beyond the jurisdiction of the court, so as to let in proof of his handwriting; they are not hearsay, but a part of the *res gestæ*. *Ib.*

25. Upon the examination of one charged with a criminal offence, the testimony of a witness was reduced to writing, or so much thereof as the committing magistrate considered material, the accused being present and cross-examining the witness. The witness died, and the minutes of the examination being lost, and not being found, either in the office of the magistrate or in the court where the indictment was pending, it was held, that as only so much of the testimony as the magistrate deemed material had been committed to writing, he could not be called on to prove the substance of

the testimony thus reduced to writing, without also proving what was omitted to be inserted. *Quere*, was there sufficient predicate laid for the introduction of the secondary evidence, without proving that the magistrate had returned the paper to the court where the indictment was found? *Sharp v. The State*, 15 Ala. 749.

26. The rule of law, that the best evidence which the nature of the case admits must be produced, applies as well to secondary as to primary evidence. *Coman v. The State*, 4 Blackf. 241.

27. If an original paper be lost, its counterpart, if one exists, is the best evidence of its contents; and inability to produce such counterpart must be shown, before a copy can be introduced. *Id.*

28. Secondary evidence of papers in the possession of a party to a cause is admitted, after notice to produce the originals, in criminal as well as in civil cases. *The State v. Kimbrough*, 2 Dev. 431.

29. A confession in a criminal case, unless it be an admission by plea, is merely evidence to be determined by a jury. *The State v. Welsh*, 7 Port. 463.

30. Mere notice to produce a paper does not authorize the adverse party to introduce it in evidence. *The State v. Wisdom*, 8 Port. 511.

31. On the trial of an indictment on the Revised Statutes, c. 127, § 8, for having in possession a counterfeit bank bill, with intent to pass it as true, knowing it to be counterfeit, evidence that the defendant had passed other counterfeit bills is admissible to show his knowledge that the bill mentioned in the indictment was counterfeit; but his conversation respecting a bill which he had passed, if made after he passed it, is not admissible to prove the fact that such bill was counterfeit, without the production of the bill itself, or proof that it is destroyed, or is in possession or control of the defendant. *The Commonwealth v. Bigelow*, 8 Met. 235.

32. Where a justice of the peace took the confessions of a prisoner in writing, at the time they were made, it is error to permit the justice to testify of these confessions from re-

collection, the non-production of the writing not being accounted for. *Peter v. The State*, 4 S. & M. 31.

33. "There is no difference as to the rules of evidence," says ABBOTT, J., "between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in one ought to be rejected in the other." *Watson's Case*, 2 Stark. N. P. C. 155.

34. It is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. Gill. Ev. 3.

35. Where, upon an indictment for setting fire to a house, in order to prove that the house was insured, the books of the insurance office were produced, in which there was an entry to that effect, Lord KENYON ruled, that as the policy was the best evidence, the prosecutors could not give any evidence from their books, it being inferior evidence, unless notice had been given to produce the policy. *Doran's Case*, 1 Esp. 127.

36. If a witness, in the course of his examination, be asked to testify respecting a transaction, before the question is answered, it is competent for the other party to inquire and know whether the transaction be in writing; and if it be, the witness cannot be permitted to give parol evidence on the subject. *Rice v. Bixler*, 1 Watts & Serg. 445.

37. On an indictment under the statute of 8 and 9 Wm. III. c. 26, 81, for having coining instruments in possession, (repealed and re-enacted by 2 Wm. IV. c. 24,) it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor was the warrant of commitment or the depositions before the magistrate given in evidence to show on what transactions, or for what offence, or at what time the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held, that there was not sufficient evidence that the prisoners were appre-

hended upon transactions for high treason respecting the coin, within three months after the offence committed. *Phillip's Case*, Russ. & Ry. C. C. 369.

38. Where the transactions of courts, which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognises. *Brush v. Taggart*, 7 Johns. 19.

39. If oral evidence of an agreement be given, the witness may be asked, in cross-examination, whether it is not in writing, and as to its contents, in order to show that parol evidence is inadmissible. *Custis v. Greated*, 1 A. & E. 167.

40. It has been recently decided, that what a party to the record says, is primary evidence against himself as an admission, although it relates to the contents of a written paper or deed, and although the contents be directly in issue in the cause. *Slatterie v. Pooley*, 6 M. & W. 664.

41. It may be laid down, I think, as an undeniable proposition, that the admissions of a party are competent evidence against himself, only in cases where parol evidence would be admissible to establish the same facts, or in other words, where there is not, in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party unless in open court, and the tendency would be to dispense with the production of the most solemn documentary evidence. *Welland Canal Co. v. Hathaway*, 8 Wend. 486.

42. Where, on an indictment for unlawfully assembling, the question was, what were the inscriptions and devices on certain banners carried at a public meeting, it was held, that parol evidence of the inscriptions was admissible without producing the banners themselves; and per Lord TENTERDEN, "Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. *Hunt's Case*, 3 B. & A. 566.

43. Parol evidence that a receipt given for a note, acknowledged that the note was in full payment of goods sold, is inadmissible, when the receipt is in existence and no measures have been taken to procure it. *Townsend v. Atwater*, 5 Day, 298.

44. In order to prove that a certain ticket in a lottery had drawn a blank, a witness testified that he was a manager of the lottery, that he attended the drawing, and that a ticket, with the combination numbers in question, drew a blank. The testimony was objected to, because the appointment of a manager could be proved by the record, because the drawing of the lottery could be proved only by the manager's books, and because the result could not be ascertained without producing the scheme. It was held, that the testimony was admissible. *Barnum v. Barnum*, 9 Conn. 242.

45. In proving handwriting, the evidence of third persons is not inferior to that of the party himself. Such evidence is not, in its nature, inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. 1 Phil. Ev. 212, 6th ed.

46. The rule is, that secondary or inferior shall not be substituted for evidence of a higher nature which the case admits of. The reason of that rule is, that an attempt to substitute the inferior for the higher, implies that the higher would give a different aspect to the case of the party introducing the lesser. "The ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it; and if it shall be seen that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose co-operation was necessary be-

fore the act could be complete, then the admissions and declarations of the defendant, either in writing or to others in relation to the act, become evidence. *The United States v. Wood*, 14 Peters, 431.

47. The contents of letters which are lost may be shown by any one, without accounting for the non-production of the person to whom they were written. *Drisk v. Davenport*, 2 Stewart, 266.

48. A printed advertisement cannot be read without search after the original manuscript. *Sweigart v. Lowncaster*, 14 Serg. & Rawle, 200.

49. Where, on a prosecution for high treason, a copy of a placard was produced by the person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's and taken away twenty-five copies, it was objected, that the original ought to be produced, or proved to be destroyed, or in the possession of the prisoner; but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies, and that being taken out of a common impression, they must be supposed to agree in the contents. "If the placard," said Mr. Justice BAYLEY, "were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals, the manuscript is discharged; and since it appears that they are from the same press, they must be all the same." *Watson's Case*, 2 Stark. N. P. 130.

50. Where persons, acting in a public capacity, have been appointed by instruments in writing, those instruments are not considered the primary evidence of his appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments; and this even in the case of murder. *Basset v. Reed*, 2 Ohio, 410.

51. Where, on an indictment for perjury, in answer to an allegation in the ecclesiastical court, in order to prove that

the person by whom the oath was administered was a surrogate, evidence was given of his having been in the habit of acting in that capacity, Lord ELLENBOROUGH said, "I think the fact of his having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed, and had competent authority to administer the oath. I cannot, for this purpose, make any distinction between the ecclesiastical courts and the other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do." *Verelst's Case*, 3 Camp. 432.

52. It is not necessary to prove a bank note counterfeit by an officer of the bank. *Martin v. The Commonwealth*, 2 Leigh, 745.

53. So it is not necessary to prove property in stolen goods by the owner. *Lawrence v. The State*, 4 Yerg. 145.

54. In the same manner, where the appointment or particular character of the other party is proved, the admission of the party against whom the evidence is offered will not be secondary evidence, although the appointment be in writing. Thus, in an action for penalties on the post-horse act, brought by the farmer of the tax, it was held, not to be necessary for the plaintiff to give in evidence his appointment by the lords of the treasury or the commissioners of the stamp duties; proof that the defendant had accounted with him as farmer of the duties being sufficient. *Radford v. M'Intosh*, 3 T. R. 632.

55. The authority of an agent to act for a corporation need not be proved by record or writing, but may be presumed from acts and the general course of business. *Warner v. Ocean Ins. Co.*, 16 Maine, 439.

56. It seems that there is no case where parol evidence has been admitted merely because a paper is in the hands of a third person, and the court in their discretion have refused a subpoena *duces tecum*. *Gray v. Penland*, 2 Serg. & Rawle, 31.

57. A written contract, deposited in the hands of a witness in a foreign state, by the parties, may be proved by the deposition of the depositary, and need not be produced in court. *Bailey v. Johnson*, 9 Cowen, 115.

58. An original paper, in the hands of a person who cannot be reached by the process of the court, so as to compel its production, may be proved by parol. *Ralph v. Brown*, 3 Watts & Serg. 395.

59. The admissions of a party proven by parol testimony, are not admissible to prove the contents of a deed or written instrument, without the absence of the instrument is accounted for by evidence of notice to produce it or of its loss. The absence of the instrument in another state is not sufficient reason for admitting parol evidence of its contents. *Threadgill v. White*, 11 Ired. 591.

60. In the examination of a witness on *voir dire*, it is permissible for him to testify as to the contents of written instruments that are not produced. *Hernden v. Givens*, 16 Ala. 262.

61. If the interest of a witness appear at any time during his examination, his testimony should be overruled. But for the purpose of showing such interest, he may be asked on his cross-examination the contents of a writing, under which such interest arises, without accounting for its absence, in the like manner as he might upon his *voir dire*. *Den. d. Howell v. Ashmore*, 2 Zabriskie, 261.

62. Secondary evidence is admissible, where the primary evidence, being documentary, is either lost or destroyed, or where it is in the hands of the opposite party, or of his privy or agent; or it is in the hands of a person privileged from producing it, and who being required to do so, insists upon his privilege. *Marston v. Downes*, 6 C. & P. 381.

63. The refusal of a third party to produce a document in his possession, on subpœna, which he is not justified in withholding, will not let in parol evidence of its contents; the only remedy of the party is by an action against him. *Jesus' College v. Gibbs*, 1 Y. & Coll. 156.

64. Where a prisoner's attorney produced a deed as part of the evidence of his client's title upon the trial of an ejectment, in which the prisoner was lessor of the plaintiff, and the deed was delivered back to the attorney when the trial was over, it was held to be in the prisoner's possession, and the prisoner not producing it in pursuance of notice, secon-

dary evidence of its contents was received. *Hunter's Case*, 4 C. & P. 128.

65. In a case of forgery, where the prisoner was proved to have said that he had destroyed the forged deed upon which the charge was founded, it was held to be unnecessary to prove any notice to produce the deed, so as to let in secondary evidence of its contents. *Haworth's Case*, 4 C. & P. 254.

66. Where, from the nature of the prosecution, the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary. *Commonwealth v. Messenger et al.*, 1 Binn. 273.

67. Upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given, without any proof of a notice to produce. *Aickle's Case*, 1 Leach, 294; 2 East P. C. 675.

68. Upon an indictment for forging a note, which the prisoner afterwards obtained possession of and swallowed, BULLER, J., permitted parol evidence of the contents of the note to be given without any notice to produce. *Spragge's Case*, 14 East, 276.

69. If the plaintiff is deprived of the instrument on which the action is brought by a fraudulent and forcible act of the defendant, the plaintiff may give secondary evidence of its contents, and he is not obliged to notify the defendant to produce it. *Gray v. Kernahan*, 2 Rep. Con. Ct. 65.

70. On a trial for forgery it is competent to prove by the party attempted to be defrauded, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed afterwards brought to him as the same, and as such executed by him. *State v. Shurtliff*, 18 Maine, 368.

71. Where a copy of a paper is delivered to a party, and the original of the same is kept by the person delivering the copy, the original cannot be read in evidence to affect the party to whom the copy is delivered, with a knowledge of its contents, without notice being first given to the latter to

produce such copy, and a sufficient ground being laid for the admission of a copy in evidence. *The Commonwealth v. Parker*, 2 Cush. 212.

72. In criminal, as well as in civil cases, it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. *M'Nally on Ev.* 355.

73. The prisoner was indicted for arson. The commission day was the 15th of March, and the trial came on upon the 20th. Notice to produce a policy of insurance was served on the prisoner in jail upon the 18th of March. His residence was ten miles from the assize town. It being objected that this notice was too late, *LITTLEDALE, J.*, after consulting *PARKE, J.*, said, "We are of opinion that the notice was too late. It cannot be presumed that the prisoner had the policy with him while in custody, and the trial might have come on at an earlier period of the assize. We therefore think that secondary evidence of the policy cannot be received." *Ellicombe's Case*, 5 C. & P. 522.

74. A party to a cause is a competent witness to prove the loss or destruction of an original paper, in order to the introduction of collateral evidence of the contents of a paper. The affidavit of the party is a mode proper to be adopted for the introduction of the evidence of the party to a cause, of the loss of an original paper, and upon other collateral questions. Such affidavit should exclude all presumption that the party may have the paper in his own possession. *Woods v. Gassett*, 11 N. H. 442.

75. Where one party to a suit is sworn to prove the loss of a written instrument, with a view to secondary evidence, though the adverse party may be examined to disprove the loss and account for the instrument, yet he cannot, under color of this right, give testimony denying, directly or indirectly, the former existence of the instrument or the matters designed to be evinced by it. The party affirming the loss cannot be sworn, until after the former existence of the instrument has been established by independent evidence; and when sworn, his testimony, as well as that of his adversary, is, in general, to be confined to the single question of loss. *Woodworth v. Barker*, 1 Hill, 171.

76. If a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; but if the party giving the notice takes and inspects it, he takes it as testimony to be used by either party if material to the issue. *Penobscot Boom Corporation v. Lamson*, 16 Maine, 224.

77. Where the original of a document is proved to be lost or destroyed, secondary evidence of its contents may be given in criminal as well as in civil proceedings. *United States v. Reyburn*, 6 Peters, 352.

78. It is not an universal and inflexible rule that a plaintiff must himself make oath to the loss of a paper of which he is presumed to have the custody, and of diligent search for it, before he can introduce secondary evidence of its contents. *Foster v. Mackay*, 7 Met. 531.

79. If an instrument be lost to the party in consequence of an irregular or defective transmission by mail, it will let in secondary evidence. *United States Bank v. Sill*, 5 Conn. 106.

80. If, in an indictment for forgery, the instrument be destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence. The next best evidence is the rule; therefore, if there be a copy which can be sworn to, that is the next best evidence. *United States v. Britton*, 2 Mason, 464.

81. Upon an indictment for false pretences contained in a letter, upon proof of the loss of the letter, parol evidence of its contents is inadmissible. *Chadwick's Case*, 6 C. & P. 181.

82. Where a particular place, claimed to be a public highway, had never been opened, or worked, or used as a public highway, it was held, that it could not be proved a highway by parol. *Harrington v. The People*, 6 Barb. Sup. Ct. 607.

83. It must be shown that a defendant signed a confession taken before a magistrate, or admitted it to be correct, in order to exclude parol proof of the confession. *The State v. Eaton*, 3 Harringt. 554.

84. In North Carolina, parol evidence, by a magistrate, of the declarations of a prisoner before him, is inadmissible, his

examination being required by statute to be recorded within three days after it is taken. *The State v. Grove*, Martin, 43.

85. Words used by one person are not evidence against another, unless they are engaged in a common occupation, and then they are not conclusive. *Commonwealth v. Eberle*, 3 S. & R. 9.

86. On an indictment for open, gross lewdness, and lascivious behavior, evidence of secret lewdness is irrelevant. *Commonwealth v. Catlin*, 1 Mass. 8.

87. On an indictment under a by-law against fast driving, evidence of the defendant's general character, as a careful driver, is irrelevant. *Commonwealth v. Worcester*, 3 Pick. 462.

88. So is evidence of permission to drive fast from the mayor and aldermen of the city. *Ib.*

89. And whether the by-law be reasonable or otherwise, is a question of law, and evidence to that point is inadmissible. *Ib.*

90. Whether evidence be competent or not, is always a question for the decision of the court. *Townsend v. The State*, 2 Blackf. 151.

Burden of Proof.

1. Where a minister of the "United Baptist Society" granted certificates of membership, the certificates were presumed to be true until the government proved them to be false. *Commonwealth v. Stow*, 1 Mass. 54.

2. But in such a case, slight negative testimony will be sufficient to shift the burden upon the defendant to prove the affirmative. *Ib.*

3. Thus, on the trial of an indictment, the jury were instructed that, when the government had made out a *prima facie* case, it was incumbent on the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial. It was held, that the instruc-

tion was erroneous, and that the jury should have been instructed that the burden was upon the commonwealth to prove the guilt of the defendant; that he was to be presumed innocent, unless the whole evidence in the case satisfied them that he was guilty. *Commonwealth v. Kimball*, 24 Pick. 366.

4. In a prosecution for larceny, proof that the offence was committed on the day charged in the indictment is not necessary. It is sufficient if it be shown to have been committed at any time within a year previous to the finding of the indictment. *State v. Charlot*, 8 R. 523.

5. On an indictment for murder it is never required to prove either a wound or bruise as laid. *State v. M'Coy*, 8 R. 545.

6. In general, the law presumes that every person acts legally, and performs all the matters which he is by law required to perform. The party who charges another with the omission to do an act enjoined by law, must prove such omission, although it involves the proof of a negative. *Commonwealth v. James*, 1 Pick. 375.

7. If the charge consists in a criminal neglect of duty, as the law presumes the affirmative, the burden of proof of the contrary is thrown on the other side. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. *United States v. Hayward*, 2 Gall. 284.

8. On an indictment for selling liquor without a license, it lies on the defendant to prove his license. *Gening v. The State*, 1 M'Cord, 573.

9. The record of the conviction of the principal is *prima facie* evidence of his guilt; and if the accessory, upon his trial, would discredit the record, the burden is on him to show, not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been. *Commonwealth v. Knapp*, 10 Pick. 477.

10. In criminal prosecutions, the burden of proof never shifts upon the defendant, except when he attempts to justify. *Commonwealth v. Kimball*, 24 Pick. 366; *Commonwealth v. Dana*, 2 Met. 329, 340.

11. To warrant a conviction in criminal cases upon circumstantial evidence only, where the circumstances are inconclusive in their character, *i. e.*, such, that admitting all they tend to prove, the guilt of the accused is still left wholly uncertain or dependent upon some definite probability, they must be so multiplied as to increase the probability to an indefinite extent, beyond the reach of mere calculation; but this principle does not apply to circumstances of a conclusive character; and the issue, before the appellate court can determine that the primary court erred in refusing a charge, which asserted the principle generally, the record must show that the evidence was confined to facts, entirely inconclusive in their tendency. The true test is not, whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt. *Mickle v. The State*, 27 Ala. 20.

12. If the defendant was engaged in the business of negro-trading, proof of one act, in pursuance of such business, within the county in which the indictment was found, is sufficient to support a conviction. *Chambers v. The State*, 26 Ala. 59.

13. Under an indictment for gaming, the defendant may be convicted on proof, "that he and another each put up money and threw for it, by placing dice in a box, and throwing three times each, the one throwing the highest number taking the money;" although it is also shown, "that the mode of procedure and throwing the dice was the same as in the case of raffling for property. *Jones v. The State*, 26 Ala. 155.

14. If the burden of proof lies upon one party, it cannot be charged and thrown upon the other by the form of pleading. *The State v. Melton*, 8 Mis. 417.

15. In an indictment for keeping a ferry without license, the burden is upon the defendant to show that he has a license, without the state's offering any evidence to show the contrary. *Wheat v. The State*, 6 Mis. 455.

16. On a trial for murder, there was evidence that a murder had been committed, and that the house in which the

dead body was, had been subsequently set on fire, under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house when the fire was set. The court charged the jury, that if the prisoner "might" have been at the scene of the fire, "the *onus* was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire. Held, that this instruction was erroneous. *The People v. Bodine*, 1 Denio, 281.

17. In criminal cases, the *onus probandi* rests on the prosecutor, unless a different provision is expressly made by statute. *United States v. Gooding*, 12 Wheat. 460.

18. Where goods are seized and claimed as forfeited, as part of the cargo, the *onus probandi* is on the government to prove that such goods were part of the cargo on board at the time of the offence. *United States v. An Open Boat*, 5 Mason, 232.

19. Where the defence, on an indictment for murder, is, that the prisoner was under the age of presumed capacity, the burden of proof lies on the prisoner. If the age can be ascertained by inspection, the court and jury must decide. *The State v. Arnold*, 13 Ired. 184.

20. In an action for the recovery of penalties under the hawkers' and pedlars' act, (29 Geo. III. c. 26, § 4, repealed and re-enacted by 50 Geo. III. § 7,) against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, viz., of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. Phil. Ev. 828.

21. It is a general rule of evidence, established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative. Phil. Ev. 827.

22. It is, however, necessary to look to the substance, and not to the form of the issue, for in many cases a party, by making a slight change in the form of his pleading, might

make the issue affirmative at his pleasure. *Sower v. Legatt*, 7 C. & P. 613.

23. Where a person, on whom stolen property is found, gives a reasonable account of how he came by it, the prosecutor ought to show on the trial that the account is untrue. *Aliter*, if that account be unreasonable or improbable on the face of it. Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N., who lived about two miles off, Mr. Baron ALDERSON held, that it was incumbent on the prosecutor to negative this statement. N. was not called by either party. The prisoner was acquitted. *Crowhurst's Case*, 1 Carr. & K. 370.

Character.

1. Where, upon the trial of an indictment, no proof as to the general character of the prisoner is given, the law assumes that it is of ordinary fairness. *Ackley v. The People*, 9 Barb. Sup. Ct. 609.

2. A prisoner on trial may show what his reputation is, and then the question is open to the prosecution, and for the jury to decide like other controverted facts. *Id.*

3. But if he choose to give no evidence on the subject, the jury is not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. *Id.*

4. On the trial of such an indictment, it is competent for the government to give in evidence the declaration of the defendant that he considered the law unconstitutional, and intended to sell in disregard of it, although the alleged sale was after the defendant had been convicted on an indictment for a similar offence, on the trial of which the same declaration had been given in evidence. *Commonwealth v. Kimball*, 24 Pick. 366.

5. The general character of a witness, at his place of business, cannot be shown by evidence of what rumor said of it

before he came to that place. *Campbell v. The State*, 23 Ala. 44.

6. Upon a trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by the prisoner's counsel, stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. Thereupon the prosecution proved that the prisoner had been convicted of larceny, ten years before. Held, that the previous conviction was admissible under 6 and 7 Wm. IV. c. 111, and 14 and 15 Vict. c. 19. *Regina v. Shrimpton*, 8 Eng. Law and Eq. Rep. 587.

17. In a criminal prosecution, the defendant cannot prove particular acts of his good conduct, neither can the state prove particular acts of his bad conduct, but proof of general character is alone admissible. *Engleman v. The State*, 2 Carter, (Ind.) 92.

8. On a trial for murder, the character of the deceased, as a violent man, is not admissible in evidence. *The State v. Thanley*, 4 Harringt. 562.

9. Good character in a clear case will be of no avail. *The State v. Wells*, 1 Coxe, 424; *Commonwealth v. Hardy*, 2 Mass. 317.

10. It is in case of doubtful facts, or to rebut the legal presumption of guilt arising from the possession of stolen articles, that a good character proved in court is of most effect. *State v. Ford*, 3 Strobb. 517.

11. If, on the trial of an indictment, the defendant introduces evidence of his good character, prior to the alleged commission of the crime charged, it is competent to the government to prove, that subsequently to that time his character has been bad. *The Commonwealth v. Sackett*, 22 Pick. 394.

12. In cases not free from doubt, the jury are at liberty to consider the prisoner's previous good character; but such a defence is not available where the guilt of the accused is clearly established. *The People v. Hammil*, 2 Parker's Cr. 223.

13. Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced, the examination may extend to particular facts. *The Commonwealth v. Robinson*, Thacher's Crim. Cas. 230.

14. In criminal cases, evidence of previous good character is proper for the consideration of the jury, not only where a doubt exists upon the other proof, but even to generate a doubt as to the guilt of the accused. *Felix v. The State*, 18 Ala. 720.

15. Where a record of conviction of a witness for petit larceny is offered in evidence for the purpose of discrediting such witness, it is not a good ground for rejecting such evidence, that it related to a transaction which occurred more than twenty-five years before, though such evidence, unaccompanied by proof of subsequent bad character, is entitled to but little weight. *Lake v. The People*, Parker's Cr. 495.

16. On a trial for murder, testimony to the defendant's good character, though entitled to less weight than in trials for offences of a lower grade, is competent evidence in defence. *Commonwealth v. Webster*, 5 Cush. 295.

17. The fact that a prisoner has not attempted to show his good character by evidence, is not evidence tending to show that he is of bad character. *State v. O'Neal*, 7 Ired. 251.

18. The reputation of a man who has been killed, as to his being quarrelsome and quick-tempered, cannot be admitted in evidence on the trial of the murderer, except the evidence of the killing be wholly circumstantial. *The State v. Barfield*, 8 Ired. 344.

19. Where a prisoner, to rebut the effect of evidence tending to show his guilt, relies upon his good character, he must introduce evidence of such good character, and it is not enough to rely upon the general presumption of innocence. *The State v. Ford*, 3 Strobb. 517.

20. On the trial of a prisoner for a rape, evidence of the good character of the female is competent, by way of confirming her credibility before the jury. *Turney v. State*, 8 S. & M. 104.

21. The general reputation of a kidnapper is evidence of the intent with which the defendant aided such kidnapper in carrying off a free negro. *The State v. Harten*, 4 Harringt. 582.

22. Evidence of good character is available only in doubtful cases. *Bennett v. State*, 8 Humph. 113.

23. Good character is evidence, but not strong, in favor of the defendant, in an indictment for perjury. *Schaller v. State*, 14 Mis. 402.

24. After an effort has been made to assail the general reputation of a plaintiff in slander, he may prove his good character. *Holley v. Burgess*, 9 Ala. 728.

25. The fact that a witness admits, on his cross-examination, that he has been prosecuted and bound over, on a charge of perjury, will not authorize the party calling the witness to give evidence of the general good character of the witness. *The People v. Gay*, Parker's Cr. 308.

26. A party can only give evidence of the good character of his witness, when impeaching witnesses have been called on the other side. *Ib.*

27. By impeaching witnesses, in such case, is meant only such as have spoken to general character, or to character for truth. *Ib.*

28. On the trial of an indictment for incest, charged to have been committed by a father with his daughter, the declarations of the defendant are competent evidence upon the question of consanguinity. *The People v. Hariden*, Parker's Cr. 344.

29. On a trial of murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by him before the inquest, taken down at the time by the coroner, and read to the witness and signed by him. *Wormby's Case*, 10 Gratt. 658.

30. Though in a prosecution for a rape it is competent to prove the fact of a recent complaint by the female, for the purpose of restoring her credit, it is not competent to prove any particulars of the description of the person committing the offence, which may have been given by her. *Brogy's Case*, 10 Gratt. 722.

31. If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be supported by proving other statements made by him in accordance with it. *Beauchamp v. The State*, 6 Blackf. 299.

32. The bad character of the parents of the prosecutrix is

not admissible evidence in behalf of a party charged with rape. *State v. Anderson*, 19 Mis. 241.

33. Evidence of good general character is not admissible, where the evidence against the defendant is clear and convincing. *United States v. Rouderbush*, 1 Baldw. 514.

34. The credibility of a female witness may be impeached by proving that she is a prostitute. *Commonwealth v. Murphy*, 14 Mass. 387.

35. Indictment for receiving and concealing stolen goods. Upon the trial the state introduced one A. as a witness, who testified that one B. C. and himself stole the goods, and that the defendant, knowing them to be stolen, received them into his possession, and assisted in concealing them. The defendant thereupon proved by other witnesses, that A. had made the charge against the defendant with the hope of a pardon, and that the defendant had had nothing to do with the matter. The state, then, to sustain A.'s evidence, offered a witness to prove that A. had testified to the same thing before the grand jury, and the court, notwithstanding the defendant's objection, admitted the evidence. *Perkins v. The State*, 4 Ind. 222.

36. A party introducing a witness to impeach the testimony of another witness, is not restricted to the simple inquiry as "to the general character of the witness *for truth and veracity*;" he may inquire into the general character of the witness, whose testimony is sought to be impeached, but cannot inquire into any *particular acts* of an immoral character which may have been committed by the impeached witness. *State v. Parker*, 7 An. 83.

37. A person accused of crime may prove, in his defence, his general good character, and also his character as to such moral qualities as have pertinence to the charge. *Ib.*

38. The competency of a witness to testify is restored when he has suffered the penalty of the crime for which he has been convicted. *State v. Sarah Conner, f. w. c.* 7 An. 379.

39. If a person, on trial for an alleged offence, offer no evidence of his good character, no legal inference can arise, from such omission, that he is guilty of the offence charged, or that his character is bad. *State v. Upham*, 38 Maine, 261.

40. Where testimony is offered to impeach the general character of a witness for truth, the inquiries are not limited to the character of the witness prior to the suit, but extend to the time of the examination of the witness. *The State v. Howard*, 9 N. H. 485.

41. The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from such general reputation, the person testifying would believe such witness under oath as soon as men in general. *Ib.*

42. On cross-examination, inquiries as to the means of knowledge of the character of the witness, the origin of reports against him, how generally such reports have prevailed, and from whom, and when they heard them, are admissible. *Ib.*

43. On a trial for murder, evidence of the good or bad character of the deceased is inadmissible, except in cases where it has a tendency to show the character of the *act* of killing; as whether it was committed in self-defence or not. *Quesenberry v. The State*, 3 Stew. & Port. 308.

44. Where a prisoner introduces evidence in support of his general good character, and the commonwealth endeavors to impeach it, the impeaching witness must not give in evidence conversations held with others subsequent to the commencement of the prosecution. *Carter v. Commonwealth*, 2 Virg. Cas. 169.

45. Where the person injured, and the principal witness in a prosecution for an attempt to commit a rape, was deaf and dumb, the public prosecutor offered evidence to prove that her general character for truth was good. It was held, that such evidence was admissible, though no impeachment of her character had been attempted. *State v. De Wolf*, 8 Conn. 93.

46. In an indictment for fornication, general reputation in the neighborhood of the defendant, that he lived in fornication with a woman, is inadmissible. *Overstreet v. The State*, 3 How. (Miss.) 328.

47. A witness, who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witness sought to be discredited

before he can be heard to speak of his own opinion, or of the opinion of others as to the reliance to be placed on the testimony of the impeached witness. *The State v. Parks*, 3 Ired. 296.

Circumstantial Evidence.

1. When a fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the contrary be proved. In criminal cases, from the secret manner in which guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged, *i. e.*, to produce a witness who saw the act committed; and, therefore, recourse must necessarily be had to presumptive (or, as it is often called, *circumstantial*) evidence, *i. e.*, the direct evidence of circumstances, from which the commission of the act may be presumed by the jury. Russell on Crimes, vol. ii. 726.

2. It is probable that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses, who have deliberately sworn falsely to the facts constituting the guilt of the party accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare that no human testimony to circumstances or to facts is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administrations of public justice. If, on the other hand, such cases are addressed as a mere admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden con-

clusions and slight suspicions, there is certainly nothing objectionable in the course, although, under the solemn circumstances of the present case, it seems hardly necessary to enforce an appeal, the importance of which is so deeply felt by all who sit on this trial. *United States v. Gilbert et al.*, 2 Sumner, 27.

3. Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. It is not strange, that in the vast number of persons who had suffered the penalties of the law, some should have suffered wrongfully. *People v. Thorne*, 6 Law Rep. 54.

4. The eye of Omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears that he has seen a fact committed. *Wills on Circum. Ev.* 188.

5. Circumstantial evidence is in the *abstract* nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of a blemished character, is not so satisfactorily proved as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of doubtful credibility. Indeed, I scarcely know whether there is any such thing as evidence purely positive. You see a man discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse, and you *INFER* from all these circumstances that there was a ball discharged from the gun which entered his body and caused his death, because such is the usual and natural

cause of such an effect. But you did not see the ball leave the gun, pass through the air and enter the body of the slain; and your testimony to the fact of killing is thereby only inferential—in other words, circumstantial. It is *possible* that no ball was in the gun, and we *INFER* that that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearances verified by *post mortem* examination, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. I remember to have heard it doubted in this court-room, whether the death of a man, whose brains oozed through a hole in his skull, was caused by the wound or a misapplication of the dressings. To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence.

The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect; but you are not, therefore, to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a rail-road, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial—the difference being only in the degree; and it is sufficient for the purpose when it excludes

disbelief—that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is, that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eye-witness of the fact, you are bound to find her guilty. *Com. v. Harman*, 4 Barr, 269.

6. The distinction between direct and circumstantial evidence is this. Direct or positive evidence is where a witness can be called to testify to the precise fact which is the subject of the issue in trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course, no one can be called to testify to it, is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

The necessity, therefore, of resorting to circumstantial evidence, if it be a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes and about the execution of criminal acts, seek the security of secrecy and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and—thanks to a beneficent Providence—the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

Strong circumstantial evidence, in cases of crime committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen, that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.

Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that you have the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and the case may not afford the means of detecting his falsehood.

But, in a case of circumstantial evidence, where no witness can testify directly to the fact to be proved, you arrive at it by a series of other facts, which by experience we have found so associated with the fact in question, as, in the relation of cause and effect, that they lead to a satisfactory and certain conclusion; as when foot-prints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and from the form and

number of the foot-prints it can be determined, with equal certainty, whether it was a man, a bird or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

From this view, it is manifest that great care and caution ought to be used in drawing inferences from the proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the person who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved shall be held to be evidence of another fact, as where it was provided by statute that if the mother of a bastard child give no notice of its expected birth, and be delivered in secret, and afterwards be found with the child dead, it shall be presumed that it was born alive, and that she killed it. This is a forced and not a natural presumption, prescribed by positive law, and not conformable to the rule of common law. The common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from all the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only, it must be reasonably and morally certain.

The next consideration is, that each fact which is necessary to the conclusion, must be distinctly and independently

proved by competent evidence. I say, every fact necessary to the conclusion; because it may, and often does happen, that in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it, and not repugnant, and go to rebut any contrary presumption. *Bemis' Webster's Case*, 462.

7. The *onus* of proving every thing essential to the establishment of the charge lies on the prosecutor, though the non-production of explanatory evidence, clearly in the power of the defendant, must weigh against him. *Rex v. Bendett*, 4 Barn. & Ald. 140.

8. In every criminal case, the defendant's guilt must be made out by evidence sufficiently conclusive to exclude any reasonable supposition of his innocence. *State v. Newman*, 7 Ala. 69.

9. The neglect of a defendant to produce evidence of good character, does not afford ground for a presumption of law against him, and it should not be so left to the jury by the court. *State v. M'Callister*, 11 Shep. 139.

10. I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there were due proof made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead. 2 Hale P. C. 290.

11. To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would be an entire misapplication of the doctrine of presumption. *Evans v. Evans*, 8 Hagg. C. R. 105.

12. The proof must be clear and distinct; thus, in a case of horse-stealing, a mere declaration in evidence that the horse had been stolen is not sufficient evidence of the *corpus delicti*. The facts must appear, so that the judge and jury may see whether such facts, in point of law, amounted to a felonious taking and carrying away of the property in question. *Tyner v. State*, 5 Humph. 383.

13. The weight of authority now clearly is, that in cases of

alleged infanticide, it shall be clearly proved that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth. *Rea v. Poulton*, 5 Carr. & Paine, 399.

14. If, however, a child has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after birth. *Rea v. Brain*, 6 Carr. & Paine, 350.

15. In trials for poisoning, it should be observed that it does not necessarily follow, even where poison has been administered, that death has resulted from other than natural causes. *Wills on Cir. Ev.* 209.

16. Circumstantial evidence has been received in every age of the common law, and is to be acted on after it has generated full conviction; every thing calculated to elucidate the transaction should be admitted, since the conclusion depends on a number of links, which alone are weak, but taken together are strong and able to conclude. *McCann v. The State*, 13 S. & M. 471.

Competency and Relevancy of Evidence.

1. Where a witness, being asked by the prisoner's counsel why she put a particular question to the deceased just before his death, answered, that she did so "in consequence of what the prisoner had told her some two hours previous," this will not authorize the prisoner to give in evidence his conversation with the witness at the time referred to. *McLean v. The State*, 16 Ala. 672.

2. The prisoner and the deceased having had a difficulty the evening before the homicide, the prisoner threatened that between the setting of the sun on that evening and its rising on the next day he would kill the deceased. On the next morning, the sun having just risen, the prisoner, armed with a gun, was on the road that led to the house of the deceased, and immediately before he shot the deceased had a conversation with a witness, who was examined upon the trial. Held,

that if the witness, without objection on the part of the prosecution, is permitted to state that the prisoner, in that conversation, spoke of the difficulty of the evening before, the door is opened for the admission of the entire conversation, and it is error to exclude it, so long as the other portion is suffered to remain before the jury. *Ib.*

3. Where insanity is set up as a defence to an indictment for murder, the subsequent as well as previous acts and declarations of the prisoner, are admissible in evidence to show his true mental condition at the moment of the homicide. *Ib.*

4. It is not competent for a defendant, indicted for larceny, to prove by a witness that he, the witness, had heard a slave confess that he committed the act with which the defendant was charged. *Rhea v. The State*, 10 Yerg. 258.

5. Where a person was indicted as accessory before the fact to the crime of murder, and it appeared that the inducement to the murder was the exertions of the deceased to ascertain the perpetrators of a former murder, it was held competent to show the guilt of the prisoner as to the former murder, for the purpose of showing a motive for his conduct respecting the murder in question. *Dunn v. The State*, 2 Pike, 229.

6. In a criminal prosecution, the only legitimate purpose for which the accused can introduce evidence to show hostile feelings towards him on the part of a witness for the state, is to impeach his credit; and where, after such witness had testified to the commissions by the accused of the offence charged at different times, it is proven that he did a particular act to entrap the accused, and thereby to procure additional evidence against him, it is not error in the court to refuse to instruct the jury that they might consider it as a circumstance tending to show that the witness had no proof before that time that would convict the defendant. *Rossett v. The State*, 16 Ala. 362.

7. A. being on trial for the murder of a slave, and it being proved that he was acting in the capacity of overseer for B., a witness on the part of the state was permitted, notwithstanding objections on the part of the prisoner, to testify as to the prisoner's general habit as overseer, in punishing slaves upon

the plantation of the owner of the slave killed. Held, that such evidence was inadmissible, being calculated to prejudice the jury against the prisoner, and not being responsive to any charge made. *Dowling v. The State*, 5 S. & M. 664.

8. In a prosecution for a violation of the act to prevent gambling, evidence may be introduced showing that the defendants had been engaged in gaming and playing at other times previous to the day charged in the information. *State v. Agudo*, 5 An. 185.

9. Silence, indicating unusual seriousness, on the part of one charged as a participant, at or about the time of the commission of the crime, is a fact from which a guilty knowledge may be inferred, and evidence of it is therefore admissible. Such a fact, however, of itself, should weigh but little, and ought to be considered with great caution by the jury. *Johnson v. The State*, 17 Ala. 618.

10. When it is shown that a crime has been committed, and the circumstances point to the accused as the guilty agent, facts tending to show a motive, although remote, are admissible in evidence. The jury, however, cannot be too cautious with respect to the importance they attach to this species of testimony. *Baalam v. The State*, 17 Ala. 451.

11. On the trial of an indictment, wherein the accused is charged with having obtained property of a witness by means of threats, testimony to prove that the same property was afterwards found in a concealed state, in the dwelling-house of the accused, is admissible, as it might have a tendency to corroborate the testimony of the witness, by satisfying the jury that the accused was conscious of having improperly obtained it. *The State v. Bruce*, 11 Shep. 71.

12. On the trial of an indictment for murder, it was held, that evidence that the deceased, while on his way to the place where he was found murdered, and the day before he was supposed to be killed, had stated that he was going to that place, and that the defendant was going with him, was incompetent evidence. *Kirby v. The State*, 9 Yerg. 383.

13. Where three are indicted jointly for murder, the statements and threats of two against the deceased, made in the absence of the other, were admitted in evidence; the

testimony warranting the conclusion that they were all acting in concert in the prosecution of a common design; and although temporarily separated, such separation being for the purpose of providing weapons and making preparation to carry their design into execution. *Gardner v. The People*, 3 Scam. 83.

14. Upon the trial of an indictment, the prosecution is not entitled to give in evidence an anonymous letter, written by a stranger, though a witness for the prosecution had spoken of it on the direct examination, and had been cross-examined concerning the circumstances under which it was received by the defendant's counsel, its contents not having been disclosed on such examination. *The People v. Costello*, 1 Denio, 83.

15. After evidence has been introduced by the defendant in a trial for murder, that the person alleged to have been murdered was seen alive afterwards, the government cannot call witnesses to prove that, about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood where the murder was said to have taken place. *Commonwealth v. Webster*, 5 Cush. 295.

16. In an indictment for a criminal offence, it is admissible to prove, that after the defendant was arrested upon a charge of the alleged crime, he left the country and forfeited his recognizance. *Porter v. The State*, 2 Carter, (Ind.) 435.

17. The prisoner was indicted for murder, in killing another in a quarrel respecting a division fence. On the cross-examination of a government witness upon the trial, it appeared that the deceased once said that, according to the survey of A., the fence stood upon the land of the prisoner, but that he did not believe that survey was correct, because B. afterwards made the survey, and by that the fence stood on deceased's land. Held, that B. might be introduced as a witness to prove that he had made the survey, as stated by deceased. *Lambeth v. The State*, 23 Miss. (1 Cush.) 322.

18. On the trial of a husband for the murder of his wife,

the state has a right to prove a long course of ill-treatment by the husband towards the wife. *State v. Rash*, 12 Ired. 382.

19. Declarations of the deceased, that she had been guilty of adultery, were held inadmissible for the defence, as irrelevant. *Ib.*

20. It is competent, in support of a prosecution, to prove that the prisoner advised an accomplice to break jail and escape. *The People v. Rathbun*, 21 Wend. 509.

21. But evidence that the prisoner refused to escape when he might have done so, is inadmissible. *Ib.*

22. In the defence of a criminal prosecution for a defect in a highway, established by the county commissioners, it is not competent to prove, even by the commissioner's record, that there were irregularities in their preliminary proceedings. *The State v. Madison*, 33 Maine, (3 Red.) 267.

23. As a general rule, no evidence is admissible of other felonies committed by the prisoner than that charged in the indictment. But there are exceptions to this rule, one of which is where it becomes material to show the intent with which the act charged was done, when evidence may be given of a distinct offence, not laid in the indictment. *State v. Patza*, 3 An. 512.

24. When it is necessary to prove a guilty knowledge on the part of the accused, it is sometimes allowable to give evidence of other offences committed by him, though not charged in the indictment, as in the case of forgery and uttering counterfeit coin. *Tharp v. The State*, 15 Ala. 749.

25. Under the Virginia statute of March 15, 1832, a white person, free negro or mulatto, knowingly receiving stolen goods from a slave, free negro or mulatto, is a principal felon, not an accessory, and so the record of conviction of the actual thief is not admissible evidence against him. *Smith's Case*, 10 Leigh, 695.

26. Where a person was slain, and the proof of the agent and the attendant facts rested on circumstantial testimony, the fact that the accused was of mild and pacific temper and habits, was held admissible, to aid the jury in ascertaining the probable grade of the offence. *Carroll v. The State*, 3 Humph. 315.

27. Evidence of a distinct substantive offence cannot be admitted in support of another offence ; *a fortiori*, cannot evidence of an intention to commit another offence be received. *Kinchelow v. The State*, 5 Humph. 9.

28. An allegation in an indictment that the defendant, without being licensed according to law, sold spirituous liquors to A., is proved by evidence that A. bought the liquors of the defendant for B., at B.'s request, and with his money, without disclosing that fact to the defendant. *The Commonwealth v. Kimball*, 7 Met. 308.

29. On an information against a party for the violation of the statute against gaming by playing at a particular game, an ordinance of a municipal corporation authorizing the game, and receipts of its treasurer for the price of a license to exhibit the game during the time when the alleged breach of the statute occurred, are inadmissible. *State v. Caldwell*, 3 An. 435.

30. But the ordinance, though no such legal justification or excuse as authorized its admission to the jury as evidence, might be received by the judge after verdict, in mitigation of damages. *Id.*

31. Where a party is charged with fraud in a particular transaction, evidence may be offered of similar previous fraudulent transactions between him and third persons ; and, wherever the intent or guilty knowledge of a party is material to the issue of a case, collateral facts, tending to establish such intent or knowledge, are proper evidence. *Bottomley v. United States*, 1 Story, 135.

32. In an indictment for shooting at and shooting a person, it may be proved that the person alleged to have been shot at was an officer, engaged at the time in arresting the prisoner, although the fact is not alleged in the indictment. *Baker v. The State*, 4 Pike, 56.

33. On the trial of an indictment for keeping an establishment for the sale of confectionery, &c., without license, evidence that the title to the premises, on which the business is carried on, is in a trustee for the use of the defendant's wife, is wholly irrelevant, and properly excluded. *Williamson v. The State*, 16 Ala. 431.

34. Mere intoxication is no excuse for crime. Evidence of it may be admissible to the question of malice. *Kelly v. The State*, 3 S. & M. 518.

35. On an indictment for murder, facts which occurred about the time the homicide was committed—such as that the deceased, a short time before his death, fired off and reloaded two pistols at his house, put them in his pocket, and started immediately for the public square, the place where he was killed, and that, when he arrived there, he had about him a loaded pistol, or more, of a similar description to that found by his side, on the ground where he fell, after being shot by the prisoner—are competent evidence, without it being first proved that the prisoner had knowledge of them. *Reynolds v. State*, 1 Kelly, 222.

36. On a trial for murder occurring in an affray, a witness, who was present, may be asked whether, when the deceased rushed upon the defendant, there was time enough for the latter to escape and get out of the way before the deceased rushed upon him. *Stuart v. The State*, 19 Ohio, 302.

37. On an indictment, evidence that the prisoner attempted to escape by the use of a false key, is admissible. *Fanning v. State*, 14 Mis. 386.

38. On an indictment, evidence of prior indictments for the same offence, which have been dismissed or suspended, is not admissible. *Ib.*

39. It is not allowable to show, on the trial of an indictment, that the offence attempted to be proved to the jury is not the same to which evidence was offered to the grand jury. *Spratt v. The State*, 8 Mis. 247.

40. On an indictment for passing a forged bank note, evidence that the defendant uttered another forged note on the same bank, on the same day, is admissible in order to prove a *scienter*. *The State v. Robinson*, 1 Harr. 507.

41. On the trial of an indictment for advising the slaves of a certain person to escape from their master, it is improper to admit evidence to prove that the prisoner was guilty of advising the slave of another person, not named in the indictment, to abscond. *Cole v. Commonwealth*, 5 Gratt. 696.

42. Evidence that the defendant was charged with the

commission of the offence for which he is indicted, is not admissible against him, where he denied the charge at the time. *Kendrick v. The State*, 9 Humph. 722.

43. On a trial for murder, evidence was offered that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person. Held, that the evidence was admissible, under the circumstances of the case, though it tended to prove a distinct felony committed by the prisoner, such shooting and the killing of the deceased appearing to be connected as parts of one entire transaction. *Heath's Case*, 1 Robinson, 735.

44. Although evidence of one offence is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact that its introduction cannot be avoided. *The Commonwealth v. Call*, 21 Pick. 515.

45. Where the state, on the trial of a complaint against B., for selling wine and spirituous liquor contrary to the statute, having introduced evidence to prove the facts alleged in the complaint, B., to rebut such evidence, adduced evidence to prove, that at other times he had refused to sell; and thereupon the state, to show that such refusals of B. were not real, but a mere pretence, and thus to rebut B.'s evidence, offered in evidence a record of the court, showing the pendency at the time of those refusals of a prosecution against B. for selling wine and spirituous liquors in violation of the statute, it was held, first, that such record was admissible to show the existence of such prosecution, at the time referred to, and thus to counteract the effect of B.'s evidence; second, that if B.'s evidence was irrelevant, and for that reason inadmissible, B. could not successfully claim a reversal of the judgment against him, on the ground that the evidence adduced to rebut his irrelevant evidence was also irrelevant. *Barnes v. The State*, 20 Conn. 254.

46. On an appeal taken from the decision of a justice of the peace to the Court of Common Pleas, copies, duly certified by the justice, are the only competent evidence of the proceedings below. *Commonwealth v. Doty*, 2 Met. 18.

47. On an indictment under the statute of 6th March,

1819, section 2, for "stabbing and thrusting, with intent to commit the crime of murder," it devolving on the prosecution to show that the act was done under such circumstances that the offence would be murder if death ensued, malice must be shown; and for that purpose evidence is admissible of an attempt by the prisoner to poison the party stabbed, and this whether the attempt to poison had been declared a crime by statute or not. *State v. Patza*, 3 An. 512.

48. An indictment for *stabbing* is not supported by proof of a *cutting*. The word *stab* imports a wound made with a pointed instrument; the word *cut*, one with an instrument having an edge. *Ib.*

49. The time of the commission of an offence laid in the indictment is not material, and does not confine the proofs within the limits of that period. The indictment will be satisfied by proof of the offence on any day anterior to the finding. *State v. Agudo*, 5 An. 185.

50. On a trial for murder, evidence that the deceased was a quarrelsome man, of violent temper, and dangerous when excited, is inadmissible. *State v. Chandler*, 5 An. 489.

51. On an indictment of an accessory to murder, in order to rebut evidence of threats by the prisoner against the deceased, it is not admissible to show that he is a man of violent passions, and in the habit of using threatening language. *State v. Duncan*, 6 Ired. 236.

52. It is not competent, on the trial of a white man for the murder of a slave, to prove that the slave was generally insolent and impudent to white persons, though not so at the time of his death, to the prisoner, who caused it. *Jolly v. The State*, 13 S. & M. 223.

53. The opinion of medical men is good evidence to go to a jury, on the trial of an indictment for a homicide; and their opinions may be asked upon supposed cases, similar to the one before the court. 2 Halst. 244.

54. The opinion of witnesses as to the improbability of a blow having been given, from which death ensued, judging from the relative positions of the parties as stated by witnesses, are not admissible in evidence. 19 Wend. 569.

55. Statements made by one party to the authorized agent

of the other, relative to a matter in controversy, and not disputed or denied by the agent, are evidence in the cause. *The State v. Farish*, 23 Miss. (1 Cush.) 483.

56. A variance between the proof and the statement of the real name of the prosecutor, or a third party, is fatal, unless the name can be rejected as surplusage. Ry. & Moo. C. C. 257.

57. If a party be described as a person to the jurors unknown, and it appear that at the time of finding the bill his name was known, he will be acquitted. 3 Camp. 264.

58. An indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots. Arch. Cr. Pl. 66.

59. A written instrument, set out in the indictment, must be proved as laid, or a variance will be fatal. Matt. Dig. 119.

60. In an indictment for extortion, or for taking a greater brokerage than is allowed by law, it is not necessary to prove the taking of the precise sum laid. 6 T. R. 265, 462.

61. For the purpose of establishing a guilty knowledge or intent, proof of other acts of a similar nature with those constituting the principal charge, is sometimes admissible. 1 Denio, 574.

62. Witnesses must confine themselves to *facts*, and mere *opinions* are not admissible, except in the case of professional or scientific men in reference to questions depending on science or skill in their particular art. 7 Vt. 161; 4 Wend. 320.

63. Under an indictment for stealing a slave, any evidence tending to prove that the defendant honestly believed that he had a right to carry away and sell said slave, is admissible for him; and, therefore, where the defendant had the slave under a bailment from the former owner, since deceased, the declarations of the bailor, tending to show a sale to the defendant, are competent evidence, although referring to a paper which is not produced, and whose absence is not accounted for. *Spring v. The State*, 26 Ala. 90.

64. Any fact which tends to prove the real motive of the

prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence. *Niles v. The State*, 26 Ala. 31.

65. It is incumbent on a party offering testimony to show its relevancy, either by explanation to the court as to its bearing on the case, or by introducing other testimony connecting it with the *res gestæ*. *Dyson v. The State*, 26 Miss. 362.

66. The rule confining the evidence strictly to the point in issue is more rigidly applied in criminal cases. *Id.*

67. On an indictment for cheating a tradesman, evidence of the defendants having made false representations to other tradesmen was admitted. 4 East, 171, n.

68. So where several articles are found in the prisoner's possession, the prosecutor need not, on the probability that the prisoner stole them at different times, confine his evidence to one of them, if they might have been stolen at once. Ry. & Moo. C. C. 148.

69. Where the defendant pleads the general issue, not guilty, the prosecutor must prove every fact and circumstance stated in the indictment which is *material and necessary to constitute the offence*. Arch. Cr. Pl. & Ev. 95.

70. In no case need the precise day or even year be proved as laid, except where the time enters into the essence of the offence. 9 East, 162.

71. On an indictment for keeping a disorderly house, the opinions of witnesses that the house, as kept, is a nuisance, is not competent evidence. *Smith v. Commonwealth*, 6 B. Mon. 21.

72. In an action against the clerk of a county court, for not issuing a writ of *scire facias* against a guardian, who failed to renew his bonds, it was held, that the guardian's accounts, as rendered to the court, were admissible in evidence, to show the extent of the loss by the clerk's *laches*. *The State v. Biggs*, 11 Ired. 412.

73. Where several persons came to a house from which another came out, and a fight ensued, which resulted in the death of one of the former, it was held, that on the trial of

the party thereupon indicted for murder, a witness might be asked to state what conversation took place just before the affray, whilst the deceased, the witness and others were together, in relation to the subject-matter of an existing dispute between the defendant, on one side, and the deceased, or another person, or either of them, on the other, in relation to their going together to the house, and their purpose in going there. *Stewart v. The State*, 19 Ohio, 302.

74. Where it was testified that the defendant, in a trial for murder, had come out of a tavern on to the pavement, where other persons were standing, and got into a fight, which resulted in the murder, it was held, that a witness who testified to the circumstances of the affray, and that he came out with the defendant, might be asked, how he and the defendant were employed from the time they came out until the fight began. *Id.*

75. A witness having testified that the defendant had told him "that there was a house in Lowell, which had been his brother's, but that by some agreement, the defendant could have a deed of it any day, and that he would place it in the hands of the witness as collateral security," the defendant, with a view to contradict the witness, offered the evidence of his brother to prove that the defendant had no interest in or control of the house alluded to; it was held, that the evidence was inadmissible, on the ground that it did not tend to show what the defendant had or had not told the witness. *The Commonwealth v. Parker*, 2 Cush. 212.

76. It is sufficient that a witness, called to show what was said relative to a controversy in a certain conversation, can state the whole of that conversation, as well as such parts as relate to the matter in controversy as other things, although he may not be able to state other conversations between the same persons at other times and upon other subjects. *State v. Cowan*, 7 Ired. 239.

77. The competency of evidence cannot be always determined until all the evidence is in, and the admission of incompetent evidence may be corrected, by proper instructions to the jury. *Fitzgerald v. The State*, 14 Mis. 413.

78. Where there is a dispute as to localities, a diagram;

drawn in accordance with the testimony of a witness, may be submitted to the jury, without having been first exhibited to the witness whose evidence it contradicts. *Bishop v. The State*, 9 Geo. 121.

79. Testimony, inadmissible in itself, becomes competent by the admission of other evidence, to which it may be a reply. *Milburn v. The State*, 1 Md. 1.

80. Where evidence offered is irrelevant in law, and calculated to mislead or prejudice the minds of the jury, it would be error in the court to receive it. And it is sufficient answer to an exception for the rejection of evidence, that it was irrelevant. *The State v. Arnold*, 13 Ired. 184.

81. It is the business of the witness to state facts, and it is the province of the jury, under the direction of the court, to draw such inferences and conclusions from these facts as, in their judgment, they will warrant. *Berry v. The State*, 10 Geo. 511.

82. In a variety of cases, witnesses are permitted to give their opinion in evidence, in connection with the facts upon which it is formed. *Ib.*

83. In cases of insanity this is generally, if not universally, admitted. *Ib.*

84. Where the question at issue is one of opinion merely, as that of sanity or insanity, solvency or insolvency, personal identity, handwriting, age, &c., in all such cases it should be allowable for the witness to give his opinion, coupled with the facts from which it is formed. *Ib.*

85. Where matters of fact are to be tried, the testimony should be restricted to words and facts only. *Ib.*

86. The testimony of a constable or of a justice of the peace may be admitted, in a suit to which he is not a party, to show that he acted as and was such officer; and without such testimony, when it appears, from the indictment in the case, that one has acted as a justice of the peace, the presumption is that he was such. *The State v. McNally*, 34 Maine, (4 Red.) 210.

87. The most positive evidence may be overcome by circumstances of suspicion. *Nelson v. United States*, Pet. C. C. 235.

88. Where, upon the trial of an indictment for adultery, one act of adultery committed by the defendant with the woman named in the indictment, was proved by the testimony of a witness whose credibility the defendant attempted to impeach, it was held, that other instances of improper familiarity between the defendant and the same woman, not long before the act of adultery proved as above mentioned, might be given in evidence to corroborate the testimony of the witness. *Commonwealth v. Merriam*, 14 Pick. 518.

89. On an information for forfeiture of a package of goods, containing an article not described in the invoice, under the provisions of the act of 28th May, 1830, evidence of accident or mistake may be given to rebut the inference of fraudulent intention, but is not a sufficient ground of defence. *United States v. A Package of Wool*, Gilpin, 349.

90. On trial of the prisoner for the murder of his wife, in the absence of direct evidence, proof of an adulterous intercourse between the prisoner and another woman is admissible, to repel the presumption of innocence arising from the conjugal relation. *State v. Watkins*, 9 Conn. 47.

91. Where the witness for plaintiff in an action of slander, under the plea of justification, stated, in reply to interrogatories put to him by the plaintiff, respecting the plaintiff's character, that some persons spoke well of him, and some ill of him, being asked by plaintiff, who spoke ill of him, said J. M. charged him with a specific offence, it was held, that it became, under the circumstances, material whether J. M. did make the charge or not, and that the plaintiff had the right to prove by J. M. that he did not make it. *M'Larin v. The State*, 4 Humph. 381.

92. Where incompetent testimony has been received, and no objection is made at the time of its reception, counsel have the right to comment upon it before the jury. *Free v. The State*, 1 M'Mullan, 494.

93. The admission of illegal evidence in a criminal case is cured by the judge instructing the jury that it is illegal, and should be disregarded by them. *The State v. Givens*, 5 Ala. 747.

94. Where a jury, after a cause is committed to them, and

they have gone out, return and make an inquiry of the court as to a fact, it is within the discretionary power of the court to admit testimony respecting the matter of such inquiry. *The Commonwealth v. Ricketson*, 5 Met. 412.

95. Generally speaking, the defendant's witnesses are not examined upon an application in the Circuit Court to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But, in the incipient stages of the prosecution, the judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution. *United States v. White*, 2 Wash. C. C. 29.

96. Testimony, having a tendency to prove the issue, is admissible for the consideration of the jury, although alone it might not justify a verdict in accordance with it. *The State v. McAllister*, 11 Shep. 139.

97. Testimony, though irrelevant, may with propriety be admitted, under the expectation that it will be connected with the case by other testimony, to be laid out of the case, unless so connected as to become relevant. *Ib.*

Depositions.

1. Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment. *Commonwealth v. Ricketson*, 5 Met. 412.

2. A deposition taken in a criminal case, under the statutes of North Carolina, (Rev. Stat. c. 35, § 1,) may be read in evidence, if the witness is dead at the time of trial; and if alive, it may be used upon the cross-examination of the witness in court. *State v. Valentine*, 7 Ired. 225.

3. Such deposition is properly proved by the magistrate taking it, or his clerk; or it may be proved by any legal evidence, like another instrument. *Ib.*

4. Testimony taken by interrogatories and commission, according to the Georgia statute of 1811, cannot be read in

evidence on the trial of a criminal cause in behalf of the defendant. *McLean v. State*, 4 Geo. 335.

5. How testimony should be taken, in a criminal case, where the witness resides out of the state, *quere?* *Ib.*

6. Where the prisoner declined coming into the presence of the wounded man, whose deposition was about being taken, under the Tennessee act of 1715, c. 16, § 1, saying that he did not wish to cross-examine him, it was held, that the deposition was evidence, after the death of the deponent, on the trial of the prisoner. *Bostick v. The State*, 3 Humph. 344.

7. Where a deposition, taken before a committing magistrate, is read at the trial, with the consent of the prisoner's counsel, and on condition that time should be allowed the prisoner to prove a defect in the religious belief of the deponent, it was held, that such time having been allowed, and the testimony of the deponent not impeached, the deposition was properly read. *Bebee v. The People*, 5 Hill, 32.

8. In Arkansas, a deposition of a witness, taken in due form under the statute, at the inquest of the body of a deceased person, cannot be used as evidence against the deponent when he is afterwards indicted as accessory before the fact of the murder of the deceased, nor can parol evidence of its contents be given. *Dunn v. The State*, 2 Pike, 229.

9. Where a party, at whose request a deposition *in perpetuam* was taken, omitted, in his application, to state that he was desirous to perpetuate the testimony of the witness, as prescribed by the Massachusetts Revised Statutes, c. 94, § 34, but as no objection was made for that reason at the time of taking the deposition, and the notice of the magistrate to the deponent and their certificate showed that the deposition was taken *in perpetuam*, it was held, that such deposition was not, for that cause, inadmissible. *The Commonwealth v. Stone*, Thacher's Cr. Cas. 604.

10. There is no authority, at common law, for taking depositions in criminal cases out of court, without the consent of the defendant. *The People v. Restell*, 3 Hill, 289.

11. *Aliter*, as to depositions taken before a committing

magistrate, pursuant to 2 Revised Statutes, 709, § 13, if the statute has been followed, and the witness is dead, &c. *Ib.*

12. A reasonable time is to be allowed the accused for procuring counsel. *Ib.*

13. And the witness should be sworn before taking the deposition. *Ib.*

14. It should be taken as nearly as possible in the exact words of the witness. *Ib.*

15. The accused is to be allowed to cross-examine. *Ib.*

16. An irregularity in taking such deposition is not cured by an offer of the magistrate to take it over again. *Ib.*

17. A deposition taken before the extra sessions cannot be varied by parol, and be made to appear that it was taken before a committing magistrate. *Ib.*

18. A deposition taken conditionally, in a case of a charge for a criminal offence, and before indictment found, which is entitled in a court of general sessions, where there is no suit or proceeding pending, and in a suit which has not yet been commenced, where the accused are referred to throughout, not by their individual names but as defendants, cannot be read on the trial of an indictment afterwards preferred on that charge, for the reason, that on such an affidavit the witness could not be convicted of perjury for any false swearing. *The People v. Crystal*, 8 Barb. Sup. Ct. 545.

19. With the consent of the prisoner, the state may examine witnesses by commission. *The State v. Bonen*, 4 M'Cord, 254.

20. Where the certificate of a magistrate, who took a deposition, states it to have been "written in his presence," without stating by whom it was written, and where it appeared that the substance of it had been reduced to writing by the deponent ten days before, at a different place, and not in the presence of the magistrate, it was held, that such deposition was inadmissible in the United States' Courts. *United States v. Smith*, 4 Day, 121.

21. Although a certificate of a survey of a vessel is not evidence of the facts stated in it, yet if the surveyors, in a deposition regularly taken, refer to the certificate as contain-

ing all they knew, it is evidence. *United States v. Mitchell*, 2 Wash. C. C. 478.

22. Where a witness, called for the prosecution, contradicted the prosecutor as to the fact of the prisoner having been at her house, as stated by the prosecutor, and in order to do away with the effect of the evidence of the witness, which, if believed, disproved the whole case for the prosecution, it was proposed, on the part of the prosecution, to show that the statements made by the witness, before the magistrate, were wholly inconsistent with the account given at the trial, *ERSKINE, J.*, after consulting *PATTESON, J.*, rejected the evidence, saying, "You cannot put in evidence for the purpose of discrediting your own witness. You may call other witnesses to prove the facts denied by this witness, and incidentally contradict her and show her to be unworthy of credit, but you cannot call a witness, or give evidence, not otherwise admissible, for the purpose of discrediting your own witness." *Ball's Case*, 8 C. & P. 745.

23. Where an accomplice, who could not read, gave evidence at the trial, falling far short of what he stated before the magistrate, *GURNEY, B.*, refused to allow his deposition, which had been put into his hand, to be read to him by the officer of the court, at the instance of the prosecutor, with a view of examining upon it. *Beardmore's Case*, 8 C. & P. 260.

24. Where several depositions had been taken before the magistrate, but one only was produced at the trial, *HULLOCK, B.*, refused to receive it, though it was the only one which was taken in writing. Those not produced, he said, might be in favor of the prisoner, and it would be unreasonable to allow the prosecutor to choose which he would produce. *Pearson's Case*, 1 Lew. C. C. 97.

25. Where the prisoner was indicted for an unnatural offence, and the depositions had been taken by the magistrate himself, *PARKE, B.*, said it was very desirable that the magistrate should be present to prove the correctness of what he took down, although in point of law it was not absolutely necessary. *Pikesley's Case*, 9 C. & P. 124.

26. It is a general principle of evidence, that to render a

deposition of any kind evidence against a party, it must appear to have been taken on oath, in a judicial proceeding, and that the party should have an opportunity to cross-examine the witness. *Attorney-General v. Davison*, M'Clel. & Y. 169.

27. Where the prosecutrix was an old woman, bedridden, and there was no probability she would be able to leave her house again, GURNEY, B., allowed her deposition before the committing magistrate to be read, on the ground of there being no likelihood of her being able to attend at another assizes. *Hogg's Case*, 6 C. & P. 176.

28. A deposition on oath, taken by a justice's clerk, the justice not being present, nor at any time seeing, examining or hearing the deponent, is irregular, and no justification of proceeding founded upon it. *Caudle v. Seymour*, 1 Q. B. 889.

29. It has been held, with regard to a witness examined before the coroner, that if he is absent, proof that every endeavor has been made to find him, will not authorize the reading of his examination. *Lord Morley's Case*, Kel. 55.

Documentary Evidence.

1. In order to make a certified copy from the Secretary of State of an act of assembly of another statute admissible in evidence, under the law of North Carolina, it is sufficient that the seal of the state be attached to the certificate required from the Governor. It need not be attached to the certificate of the Secretary. *The State v. Cheek*, 13 Ired. 114.

2. A transcript of a statute, once duly certified by the Secretary of State, in the manner prescribed by the laws of North Carolina, is evidence, at all times, of its being in force, according to its terms, unless a repeal is shown. *Id.*

3. An exemplification of the record of the same court where the trial is had is not sufficient to sustain the issue under the plea of *nul tiel record*. The original record must be produced. *Adams v. The State*, 6 Eng. 466.

4. The certificate of the Secretary of State, in relation to

the statutes of another state, given in pursuance of the North Carolina statute, (Revised Statutes, c. 44, § 3,) is evidence in criminal as well as in civil cases. *The State v. Patterson*, 2 Ired. 346.

5. On an appeal taken from the decision of a justice of the peace to the Court of Common Pleas, copies, duly certified by the justice, are the only competent evidence of the proceedings below. *The Commonwealth v. Doty*, 2 Met. 18.

6. The authentication of records by the clerk, by his private seal, under the statutes of Missouri, must be by seal impressed in wax or some like substance; a scroll is not sufficient. *Gates v. State*, 13 Mis. 11.

7. A justice's transcript, certified by his successor, was, though objected to, admitted in evidence. Held, that the admission of the transcript (the record not showing the ground of the objection) could not be said to be improper. *Parker v. The State*, 8 Blackf. 292.

8. Where a party, on notice and demand, produces books or papers, which are inspected by the party calling for them, and used as evidence by him, such books or papers thereby become evidence for the party producing them; and therefore, where the partner of a defendant, who was on trial for cheating by false pretences, being called by the latter as a witness for him, and examined in chief, produced the account books of the firm, on notice and demand by the prosecuting officer, who thereupon cross-examined the witness with reference to two entries in the books, and exhibited them to the jury, with reference to those two entries, it was held, that the books thereby became evidence for the defendant as to their entire contents, and not merely with reference to the two entries for which they were originally introduced. *Commonwealth v. Davidson*, 1 Cush. 33.

9. In an action of debt upon a guardian's bond, for the purpose of sustaining an issue made, the appointment of a second guardian, signed by a person claiming to be a probate justice, and tested with a scroll, was offered in evidence. There was no certificate from him that he had no official seal, nor from the county commissioner's clerk of his official capacity. Held, that a witness might be called to prove the hand-

writing of the probate justice, and also that he was recognised and acted in that capacity, and that there had been no public seal provided for his office. *The People v. Ammons*, 5 Gilm. 105.

10. In order that the papers and letters of an insolvent debtor, produced by his assignee, may be competent evidence as coming from the possession of the insolvent, it must be shown that the assignee received them from the messenger, and that the latter took possession of them under his warrant, as papers relating to the estate of the insolvent. *Commonwealth v. Eastman*, 1 Cush. 189.

11. Letters addressed to a party, and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply or statement, or act done, on his part, and shown by other proof. *Id.*

12. Where one of two persons, who had examined and appraised the assets of an insolvent debtor, was called as a witness to the value thereof, and produced a paper signed by himself and his associates, containing the results of their appraisal, it was held, that such paper could not be read to the jury, as the joint certificate of the witness and his associate, without first calling the latter to testify to its accuracy. *Id.*

13. A memorandum of the testimony of witnesses examined before a coroner, taken by a person who was present, which witnesses are not produced in court, is not admissible in evidence on the trial of a capital case, even if it be proved. *The State v. M'Elmurray*, 3 Strobb. 33.

14. On the trial of an indictment for manslaughter, the record of a previous conviction of the defendant for an assault and battery on the person of the deceased, and judgment thereon before her death, is admissible evidence to prove the fact of such conviction; but it is not evidence of an assault committed on the deceased, as alleged in the indictment for manslaughter, or that the assault stated in the record of such conviction is the same. *Commonwealth v. M'Pike*, 3 Cush. 181.

15. Every court must make its own record, and the man-

ner of such record cannot be examined into indirectly by another court. *The State v. Corpening*, 10 Ired. 58.

16. None but private statutes are to be given in evidence. *State v. Sartor*, 2 Strobb. 60.

Dying Declarations.

1. A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval which elapsed before his death, to speak at all, and, when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death, was asked, "Did A. strike you first?" to which he answered, "Yes, sir;" "Did A. stab you?" to which he also answered, "Yes, sir;" "Do you think you are going to die?" to which he again answered, "Yes, sir." He was then asked a fourth question, but it did not appear what it was, or whether it had any relation to the subject, or at what interval after the three first it was put. Held, that these were such death-bed declarations, being distinct and competent in themselves, as were competent evidence on the trial of A. for the homicide. *Vass' Case*, 3 Leigh, 786.

2. But if it had appeared that the declarations were designed by the dying man to be connected with and qualified by other statements, and with them to form an entire, complete narrative, and that, before the disclosure was fully made, it had been interrupted, and the narrative left unfinished, such partial declarations would not have been competent evidence. *Ib.*

3. The objection, that the questions put were leading, is not properly applicable in such a case. *Ib.*

4. Dying declarations are admissible in evidence, whenever their subject-matter has reference to acts and circumstances which would constitute a part of the *res gestæ*. *McLean v. The State*, 16 Ala. 672.

5. Where declarations are offered against a defendant, made by one most mortally wounded, as to who was the per-

petrator of the injury, and the facts which attended it, *prima facie* evidence is submitted to the judge that they were made under a consciousness of impending death, and then the evidence is received and left to the jury to determine whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question is inferred. *The Commonwealth v. Murray*, 2 Ashm. 41; *The Commonwealth v. Williams*, 2 Ashm. 69.

6. The consciousness of death may be inferred by the judge from the nature of the wound, or state of illness, or other circumstances of the case, although the deceased should not have expressed any apprehension of danger. *Ib.*

7. That dying declarations may be received as evidence, it must appear that they were made by the person in the full belief that he should not recover. It is not necessary that he should be apprehensive of immediate dissolution, but that it is impending and certain. *Dunn v. The State*, 2 Pike, 229.

8. But such apprehension and belief may be shown by proof of the attending circumstances, to be judged of by the court. *Ib.*

9. Where it appears that the deceased, from the time the wound was received, fifty-two days before his death, uniformly expressed the belief that the wound was mortal, that his medical attendant had so informed him, and that he was paralyzed from the point at which the ball entered, just below the shoulder, to his feet, a sufficient predicate is laid to authorize the admission of a statement, made three days before his death, as a dying declaration. *Oliver v. The State*, 17 Ala. 587.

10. Such circumstances, connected with the homicide, as the deceased, if living, would be allowed to testify to, may be the subject-matter of dying declarations. *Ib.*

11. If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. *Anthony v. The State*, 1 Meigs, 265.

12. After the introduction of the proper preliminary evi-

dence, the prosecution is entitled to show such dying declarations, notwithstanding there may be other witnesses by whose testimony the same facts might be proved, which are sought to be established by such dying declarations. *The People v. Knickerbocker*, Parker's Cr. 302.

13. It is for the court to determine whether, under all the circumstances of their utterance, such declarations are admissible; when admitted, the jury are to judge of their weight, as of all other testimony. *McDaniel v. State*, 8 S. & M. 401.

14. On a trial for murder, it is competent to prove the dying declarations of the deceased, while he is *in extremis* and fully sensible of approaching death. If such declarations were reduced to writing, at the time, by the person who heard them, they should be produced and read, being the best evidence of the fact. Such declarations, however, can only be received to show the cause of death, but no other fact. *The State v. Cameron*, 2 Chand. (Wis.) 172.

15. The question whether dying declarations, offered in evidence, were made under circumstances to render them competent evidence, is exclusively for the court; and it is not error for the court to refuse to submit any question of fact touching its competency to the jury. *Lambeth v. The State*, 23 Miss. (1 Cush.) 322.

16. Where dying declarations, made under the belief of impending death, are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either, is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions for the jury, it is error. *Moore v. State*, 12 Ala. 764.

17. On a trial for murder, the dying declarations of the deceased are admissible, as to the cause and extent of the injury received, and are open to remark before the jury, in connection with general evidence of his intemperate habits and low state of health. *The State v. Thawley*, 4 Harringt. 562.

18. The dying declaration of a husband is competent evidence against the wife, on her trial for murder, to show her guilt. *Moore v. State*, 12 Ala. 764.

19. Such declarations may be given in evidence, as well to acquit as to convict the prisoner. *Ib.*

20. The court charged a jury, "that if they found that the deceased, in her dying declarations, made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness." Held, that this was erroneous. *M'Pherson v. The State*, 9 Yerg. 279.

21. On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner. *The People v. Greene*, 1 Denio, 614.

22. To make dying declarations competent testimony, the person making them must be conscious of the peril of his situation and believe his death impending. This need not be stated by him, but it must be fairly inferable from his language and his condition. *Nelson v. State*, 7 Humph. 542.

23. Where the deceased said on the evening before the morning of her death, "Mr. F. has killed me," and, about the same time, "I am dead, Mr. F. has killed me," it was held, that the declarations were admissible as the dying declarations of the deceased. *The State v. Poll*, 1 Hawks, 442.

24. When the dying declaration of the deceased is, "A. has shot me, or has killed me," the court must presume, *prima facie*, that the deceased intended to state a fact of which he had knowledge, and not merely to express an opinion. The jury must judge of the weight of this, as of other evidence, by the accompanying circumstances. If the deceased merely meant to express his opinion or suspicion, as an inference from the other facts, the jury should disregard it as evidence of itself. *The State v. Arnold*, 13 Ired. 184.

25. A copy of dying declarations, taken down in writing by a magistrate, is inadmissible in evidence, though, if the declarations are sworn to by the magistrate, they would be admissible. *Beets v. The State*, 1 Meigs, 106.

26. If, however, the magistrate swears that he cannot recollect the statement of the deceased, the written statement taken by him would, it seems, be secondary evidence. *Ib.*

27. Declarations *in extremis* are admissible in civil cases. *Wilson v. Boerum*, Anthon, 174.

28. The sixth article of the amendments to the constitution of the United States, which provides, that "in all criminal prosecutions, the accused shall be confronted with the witnesses against him," is not contravened by the admission in evidence, on the trial of a prisoner charged with homicide, of the dying declarations of the deceased. *Campbell v. The State*, 11 Geo. 353.

29. The dying evidence of one deceased, made under the belief of impending death, is competent proof to go to the jury, either to show who was the murdered, or to disclose the circumstances under which the crime was committed. *Moore v. State*, 12 Ala. 764.

30. Dying declarations are not admissible in evidence, unless it appear that the person making them was at the time conscious of his situation. *Montgomery v. The State*, 11 Ohio, 424.

31. The substance of such declarations may be given, if the witness is unable to give the precise words. *Ib.*

32. The declarations of a slave, in his last illness, to his attending physician, as to the nature and duration of his disease, are competent evidence in an action by the owner against the hirer for negligence in regard to the health of the slave. *Yeatman v. Hart*, 6 Humph. 375.

33. Whether declarations made by the deceased immediately after the wound is inflicted, and before he has had time to fabricate a story, and when the *lis mota* did not exist, may not be given in evidence as part of the *res gestæ, quere?* *Hill's Case*, 2 Gratt. 594.

34. The provisions of the Tennessee bill of rights, declaring the right of the accused in criminal cases "to meet the witness face to face, and have compulsory process for obtaining witnesses in his favor," is not violated by the admission of dying declarations. *Anthony v. The State*, 1 Meigs, 265.

35. On a trial for murder, the dying declarations of the deceased, if made in expectation of death, are competent evidence against the prisoner. *Hill's Case*, 2 Gratt. 594.

36. It is error to instruct a jury, on the trial of an indict-

ment for murder, that the dying declarations of the deceased, which had been written out by a witness and given in evidence, were entitled to the same credit and force before the jury as if the statements had been sworn to in court before the jury. *Lambeth v. The State*, 23 Miss. (1 Cush.) 322.

37. Where the evidence of dying declarations is offered, it is the province of the court to determine the fact whether the defendant was *in articulo mortis* at the time they were made, and to exclude them if he was not. *Smith v. The State*, 9 Humph. 9.

38. Where evidence of dying declarations was admitted, without sufficient proof that the declarant was *in articulo mortis*, and was conscious that he was so at the time the declarations were made, it was held, that a new trial should be granted, although the evidence was not objected to when offered. *Id.*

39. The declaration in the 10th section of the Mississippi bill of rights, that "the accused shall be confronted with the witnesses against him," does not abrogate the principle of the common law, that declarations *in extremis* of murdered persons may be given in evidence. *Woodsides v. The State*, 2 How. (Miss.) 655.

40. On the day on which the mortal blow was given, the witness said to the deceased, that his deposition ought to be taken, as, in the opinion of the witness, he must inevitably die before morning. The deceased replied that he thought so, too, and afterwards exclaimed, "O Lord, I shall die soon." His declarations were reduced to writing, read over to him twice, and signed by him. On the evening previous his physician had held out to him some hopes of recovery, but told him his chance was bad. The deceased lived, however, some ten days after. Held, that his declarations were admissible as dying declarations. *McDaniel v. State*, 8 S. & M. 401.

41. The declarations of a deceased person, that he was poisoned by certain individuals, made when he despaired of recovery, though not immediately previous to his death, are admissible as dying declarations. *The State v. Poll*, 1 Hawks, 442.

42. On trial for murder, dying declarations of the deceased, that is, declarations made under the apprehension of death, are competent evidence against the prisoner; but before such declarations are received, it must be satisfactorily proved that the deceased, at the time of making them, was conscious of the danger, and had given up all hopes of recovery. *The People v. Green*, Parker's Cr. 11.

43. When, by the direction of the attending physician, and in his presence, W. informed the deceased, on the day before her death, that she could not live, whereupon the deceased requested the physician to hear a communication that she desired to make, and with his consent she proceeded to give a history of the conduct of the prisoner during her illness, tending to show that he had several times, during such illness, administered arsenic to her; held, that such communication was admissible as her dying declaration. *Ib.*

44. Where, on the trial of a capital case, several witnesses are to be examined to the same point, the court may, in its discretion, require all such witnesses, except the one under examination, to leave the room during such examination. *Ib.*

45. Where a person was slain, and proof of the agent and the attendant facts rested on circumstantial testimony, it was held, that declarations of the deceased, made on the day before his death, as to the object and purpose of a contemplated trip, which he did take, was admissible on two grounds: 1st. Because it was legally contemporaneous with the main fact, the trip; and, 2d. Because it was explanatory of a conversation had in the presence of the prisoner. *Carroll v. The State*, 3 Humph. 315.

46. Dying declarations of a person who has been killed, made with regard to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of the deceased would have been had he been examined on oath. *Green v. The State*, 13 Mis. 382.

47. Dying declarations are admitted, from the necessity of the case, to identify the prisoner, and to establish the circumstances of the *res gestæ*, or direct transactions from which

the death results; when they relate to former and distinct transactions, they do not seem to come within this principle of necessity. *Quere*, therefore, whether a declaration that prisoner had two or three times before attempted to kill him, would be competent testimony? *Nelson v. State*, 7 Humph. 542.

48. The statement by the deceased of a distinct fact, in no way connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration. *Johnson v. State*, 17 Ala. 618.

49. Where a witness gives the exact words of a dying declaration, it is incompetent to ask him if it was not an opinion of the deceased; for the jury are to judge, having the exact words, what the declaration was, and for this purpose they should have all the facts affecting the declaration; therefore, it was held improper to exclude a previous conversation on the same subject, between the deceased and the witness. *Nelms v. The State*, 13 S. & M. 500.

50. Evidence of dying declarations should not be received against a prisoner, unless they were made under the consciousness of almost immediate dissolution. *Smith v. The State*, 9 Humph. 9; *Logan v. The State*, 9 Humph. 24.

51. The proof of the deceased's expectation of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. *Hill's Case*, 2 Gratt. 594.

52. Regularly, the court should first ascertain that the deceased expected to die, before his dying declarations are given in evidence to the jury; but if first given in evidence, and it appears that they were proper evidence, it is no error of which the jury can complain. *Ib.*

53. On a trial for murder, the substance of the dying declarations of the deceased may be proved. *Ward v. The State*, 8 Blackf. 101.

54. On the trial of an indictment for murder, the declarations of the deceased, touching the homicide, although he does not state at the time that he is conscious of impending death, if made under such circumstances as in the judg-

ment of the court will reasonably warrant such an inference, are admissible in evidence as dying declarations. *M'Lean v. The State*, 16 Ala. 672.

55. Where the deceased, being asked "who shot him," replied, "the prisoner," the declaration is complete, and cannot be rejected, because, from weakness and exhaustion, he was unable to answer another question propounded to him immediately afterwards. *Ib.*

56. On a trial for murder, the declarations of the deceased are no evidence to establish the insanity of the accused. *The State v. Spencer*, 1 N. J. 196.

57. The deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning pain in the stomach and bowels. On Sunday night, on Monday and on Tuesday, just before she made a declaration, she used such expressions as "I cannot stay here—I must go—good people, I am gone;" and her medical attendant considered her *in extremis* from Tuesday morning until she died. Between nine o'clock, A. M., and noon on Tuesday, she asked her medical attendant if he could help her; to which he replied, he thought he could. Held, that the inquiry and reply, taken in connection with such strong evidences of a sense of impending death, do not prove any thing beyond the hope of present ease or relief, and are insufficient to exclude the declaration of the deceased. *Johnson v. The State*, 17 Ala. 618.

58. In order to make dying declarations admissible in evidence, the deceased must not only be actually in a dying condition, but must believe that he is so. This belief may be inferred from the statements of the party, and also from the nature of the wound and other circumstances. *Campbell v. The State*, 11 Geo. 353.

59. Where a *prima facie* case has been made out, it is a question of fact for the jury, whether or not the declarations were made in immediate prospect of death. *Ib.*

60. Where the evidence as to whether or not the declarations were made with the consciousness that the declarant was *in articulo mortis*, is contradictory, the court will not interfere with the verdict of the jury and grant a new trial,

especially if satisfied that the finding was warranted by the evidence. *Id.*

61. Where a man, who was fatally wounded by another, declared, just before he died, while under a sense of impending dissolution, that the person who was arrested for the murder killed him, and in reply to a remark of his wife, said, "Save me, if you can," it was held, that to make a declaration admissible as a dying declaration, it was not necessary that the person be *in articulo mortis* if he be under an apprehension of impending death: that in this case the remark to his wife did not show in the deceased such a hope of life as rendered his declaration incompetent, for a declaration which is competent evidence when made, will not be rendered incompetent by a subsequent revival of strength in the dying person; and further, in determining the condition of the dying person, the opinion of a witness, that the deceased did or did not think he should die of his wounds, is not admissible; but the facts are to be given, and the court is to decide what he thought of his condition. *The State v. Tilghman*, 11 Ired. 513.

62. A. made an affidavit before a justice that B. had assaulted and wounded him; and on the same day gave his deposition on the same charge, before magistrates, acting as a court of inquiry, in the absence of the accused. Afterwards A. died, and B. was indicted for murdering him. Held, that the affidavit and deposition of A., not being dying declarations, having been taken *ex parte*, and on an accusation for a less offence, could not be read in evidence by the state, on the trial for murder. *Collier v. The State*, 8 Eng. (13 Ark.) 676.

63. The admission of the dying declarations of a deceased person is not prohibited by that part of the bill of rights in North Carolina which gives every man accused of a crime the right to confront the accusers and witnesses with other testimony. *The State v. Tilghman*, 11 Ired. 513.

64. The mere fact that a slave, after receiving his mortal wound, was heard to cry out, "O, my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the admission of his declarations. *Lewis v. State*, 9 S. & M. 115.

65. Slaves are presumed to have a sense of religious accountability; their dying declarations, therefore, may be shown in evidence. *Ib.*

Evidence Confined to the Issue.

1. It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. In criminal proceedings it has been observed that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. 2 Russ. 772.

2. In a prosecution for perjury, proof of the general bad character of the defendant for truth and veracity would be inadmissible. *Dewit v. Greenfield*, 5 Ohio, 227.

3. A. and B., when riding in a gig, were robbed at the same time, A. of his money and B. of his watch, and violence used towards both. There was an indictment for robbing A. and another for robbing B. Held, on the trial of the first indictment, that evidence might be given of the loss of B.'s watch, and that it was found on one of the prisoners, but that evidence could not be given of any violence offered to B. by the robbers. *Rooney's Case*, 7 C. & P. 517, a.

4. Evidence of a distinct substantive offence cannot be admitted in support of another offence; *a fortiori* cannot evidence of an intention to commit another offence be received. *Kinchelov v. The State*, 5 Humph. 9.

5. Although evidence of one offence is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact that its introduction cannot be avoided. *The Commonwealth v. Call*, 21 Pick. 515.

6. On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage cere-

mony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on *habeas corpus*, was allowed to be given in evidence. *Commonwealth v. Hevice et al.*, 2 Yeates, 114.

7. On an indictment against a man for killing his wife, the prosecutor has been allowed to prove an adulterous intercourse between the prisoner and another woman, not to prove the *corpus delicti*, but to repel the presumption of innocence arising from the conjugal relation. *The State v. Watkins*, 9 Conn. 47.

8. On the trial of a husband for the murder of his wife, the state has a right to prove a long course of ill-treatment by the husband towards the wife. *State v. Rash*, 12 Ired. 372.

9. Upon the trial of an indictment for conspiracy, where evidence has been given which warrants the jury to consider whether the prisoner was engaged in the alleged conspiracy, and had combined with others for the same illegal purpose, any act done or declaration made by one of the party, in pursuance and promotion of the common object, are evidence against the rest; but what one of the party may have said not in pursuance of the plot, cannot be received against the other. *State v. Simons*, 4 Strobb. 266.

10. Where several persons came to a house from which another came out, and a fight ensued, which resulted in the death of one of the former, it was held, that on the trial of the party thereupon indicted for murder, a witness might be asked to state what conversation took place just before the affray, whilst the deceased, the witness and others were together, in relation to the subject-matter of an existing dispute between the defendant on side, and the deceased, or another person, or either of them, on the other, in relation to their going together to the house, and their purpose in going there. *Stewart v. The State*, 19 Ohio, 302.

11. In an action for a conspiracy to defraud A., by falsely representing B. to be a man of credit, evidence that such representations were made to others, in consequence of which such other persons made the same representations to A., is admissible. *Gardner v. Preston*, 2 Day's Cases, 205.

12. To prove fraud against the defendant, a transaction between them and a third person, of a similar nature to the one in question, may be given in evidence. *Snell et al. v. Moses et al.*, 1 Johns. 99.

13. In an indictment for obtaining goods by false pretences, it is allowable to prove that the same pretences were used to another. *Collins' Case*, 4 Rogers' Rec. 143.

14. Where a party is charged with fraud in a particular transaction, evidence may be offered of similar previous fraudulent transactions between him and third persons; and wherever the intent or guilty knowledge of a party is material to the issue of a case, collateral facts tending to establish such intent or knowledge are proper evidence. *Bottomley v. The United States*, 1 Story, 135.

15. On an indictment for passing a counterfeit silver dollar knowingly, evidence that defendant had counterfeited other dollars, was held not admissible. *State v. Odel*, 2 Const. 758.

16. On an indictment for counterfeiting money, evidence of possession of instruments of coining is admissible. *State v. Antonio*, 2 Const. 776.

17. Evidence of a prisoner's endeavors to engage a person to procure for him counterfeit money; of his declared intention to become acquainted with a counterfeiter, and to remove to a place near his residence, is admissible on a prosecution for passing a counterfeit note to prove the *scienter*. *Commonwealth v. Finn*, 5 Rand. 701.

Evidence on Former Trials or in Other Suits.

1. A., who was examined as a witness against B., before a committing court, died before the trial of B. in the Circuit Court. It was proposed, by the state's attorney, to prove on the trial what A. had said before the committing court. Held, that this evidence was not in violation of the constitutional right of the defendant to meet witnesses against him, face to face, for B. had met A. face to face before the committing court, and had the right to cross-examine him, and

also had, in the Circuit Court, the right to cross-examine those who proved what A. had stated. *Kendrick v. The State*, 10 Humph. 479.

2. Where it is proposed to introduce the testimony of a deceased witness, given on a former trial between the same parties, it is not necessary to prove the exact words of such deceased witness. It is sufficient if the substance of all he said on the examination and cross-examination in relation to the subject-matter in controversy be proved. *Ib.*

3. Proof of what a deceased witness testified to on a preliminary examination, before a justice of peace, touching the same charge for which the accused stands indicted, is admissible against him, although the examination was not reduced to writing. *Davis v. The State*, 17 Ala. 354.

4. In such case it is not necessary to prove the language used by the witness in giving his testimony; its substance is all that is required. *Ib.*

5. But proof of what a deceased witness testified to, on a former trial, is not admissible, unless the point in issue is the same. *Ib.*

6. On trial of a criminal case on an appeal, evidence of what was sworn to in the inferior court, by the prosecutor, who died before the trial on the appeal, was held to be inadmissible. *The State v. Atkins*, 1 Overt. 229.

7. What a witness (since dead) swore at a previous trial on the same indictment, may be proved by a person who was present and heard his testimony, provided he can repeat the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes taken at the time, or from a newspaper, printed by him, containing the evidence as taken down by himself. *United States v. Wood*, 3 Wash. C. C. 440.

8. If a hearing be had before a magistrate, upon the complaint of a town grand juror, charging a person with the commission of a crime, and the respondent be by the magistrate bound over for trial by the county court, and an indictment be found against him, and before a trial is had upon the indictment, a witness who testified before the magistrate dies, evidence may be received, on trial upon the indictment, to

prove what that witness testified before the magistrate. *The State v. Hooker*, 17 Vt. 658.

9. It is not necessary, on such a trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient if the substance of his testimony, as then given, be detailed. *Id.*

10. The testimony taken down in writing by a magistrate cannot, on a trial of the same matter in court, be used as evidence in chief, but may be used to show contradictory statements by him. *The State v. M'Leod*, 1 Hawks, 344.

11. On the trial of an indictment for forgery, in the municipal court, it was held, that the record and judgment of the police court could not be used in evidence, unless the circumstances of the prisoner's examination there were first shown by the magistrate or some person present. *The Commonwealth v. French*, Thacher's Crim. Cas. 82.

12. In a criminal trial, the testimony of a witness at a former trial of the same indictment, cannot be read in evidence, though he be out of the state. *The People v. Newman*, 5 Hill, 295.

13. The testimony of a witness examined on a coroner's inquest, in the absence of the prisoner, though taken down in writing by the coroner, signed by the witness and returned to the clerk, is not competent evidence against the prisoner, on a trial for murder, after the death of the witness. *The State v. Campbell*, 1 Rich. 124.

14. Where the defendant pleads in bar that the matters in controversy have been adjudicated in a former suit, he is not confined to proof by the record alone, but may show, by extrinsic evidence, that the same matters were in issue in the former suit. *Rake's Administrator v. Pope*, 7 Ala. 161.

Handwriting.

1. A witness cannot be asked his opinion as to the handwriting of a party who never saw him write before the difficulty in question arose. *Pate v. People*, 3 Gilm. 644.

2. Where handwriting is to be proved by comparison,

the standard used for the purpose must be a genuine and original writing, and must first be established by clear and undoubted proof. Impressions of writings, taken by means of a press, and duplicates made by a copying machine, are not originals, and cannot be used as standards of comparison. *Commonwealth v. Eastman*, 1 Cush. 189.

3. To prove handwriting, the witness must generally know it by having seen the person write, or from having corresponded with him; but in case of ancient documents, so old that no living witness of the signatures can be produced, experts may testify to the signatures by comparing them with those which are acknowledged to be good. *West v. The State*, 2 N. J. 212.

4. Handwriting may be proved by a person who never saw the party write, if he have otherwise a knowledge of the character of his handwriting. *The State v. Spence*, 2 Harringt. 348.

5. A witness, called to prove the handwriting of a person, must be shown to have such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. *Allen v. The State*, 3 Humph. 367.

6. A witness stated, in a preliminary examination, that he had been in the habit of receiving and paying out notes of a certain bank, and he believed that he had thereby become acquainted with the handwriting of the president and cashier, though he had never seen either of them write. Held, that he was competent to testify as to the genuineness of notes purporting to be notes of such bank. *Id.*

7. Held, also, that the witness might state that, from the general appearance of one of the notes, and particular parts of the engraving, he believed it to be counterfeit. *Id.*

8. Bank notes, alleged to be enclosed in a letter stolen from the mail, need not be proved by a person who has seen the president and cashier write. *United States v. Keen*, 1 M'Lean, 429.

9. The genuineness of such notes may be proved by any one who deals in them, as the cashier. *Id.*

10. So of a check drawn on the Bank of the United States, and circulating as money. *Id.*

*
Hearsay.

1. On the trial of a prisoner for a rape, a witness was asked if he had not, at a certain time, authorized his wife to offer the victim of the outrage a home, and in what manner he had authorized it; and the record, without setting forth the answer of the witness, stated in general terms that the witness proceeded to answer in the affirmative, and to state the reasons which he had stated to his wife. Held, that the record not disclosing what the testimony was which the witness gave, the court could not determine as to its legality. *SHARKEY*, C. J., dissented, and held, that whatever might be the testimony, it was inadmissible, being a conversation between a man and his wife, not in the presence of the prisoner, and forming no part of the *res gestæ*. *Twiney v. State*, 8 S. & M. 104.

2. On an indictment for horse-stealing, a witness may state, "that on a certain night a negro servant came to witness and told him that a man had offered him a dollar to get him a horse, and that the negro promised to steal the horse and take him to the man; and that witness told the negro he could do as he had promised;" the statement is admissible to show the circumstances under which the horse was sent, and the agency of the witness in sending him. *State v. Duncan*, 8 R. 562.

3. The declarations of third persons, though not under oath, are admissible in evidence, when they form a part of the *res gestæ*. *Ib.*

4. Where the conduct of several persons show them to have been joint conspirators, the declarations of one may be given in evidence against another. *Glory v. The State*, 8 Eng. (13 Ark.) 236.

5. On an indictment for larceny, the defendant may prove that another person stole the articles mentioned in the indictment, in exculpation of himself; but it is not competent for him to prove, by the testimony of witnesses, that another person had acknowledged he had stolen the articles, for such testimony would be no more than hearsay evidence. *Commonwealth v. Chabbock*, 1 Mass. 144.

6. A witness, testifying to the identity of a coat, was not

allowed to state what was said by a free mulatto woman, confirming his statement. *Hopper v. The Commonwealth*, 6 Gratt. 684.

7. It is not competent for one on trial for larceny to prove that another person acknowledged that he had committed the theft complained of, for that would be only hearsay evidence. *Commonwealth v. Chabcock*, 1 Mass. 144.

8. What a witness shall have been heard to say shall not be received to show his interest, for it is mere hearsay. *Commonwealth v. Waite*, 5 Mass. 261.

9. The declarations of a third person, made in the presence of a party, and assented to by him, are admissible evidence against him. *Commonwealth v. Call*, 21 Pick. 515.

10. And the assent of the party is presumed, if nothing is said by him inconsistent with that presumption. *Ib.*

11. It is not enough, in proving what a deceased witness formerly testified to, to prove the substance of the testimony of the deceased witness, but the whole of his testimony and the precise words must be given. *Commonwealth v. Richards*, 18 Pick. 434.

12. The materiality of evidence, or its relevancy to the issue, is not always to be determined by the directness of its tendency to prove the issue. When a witness has been introduced and has testified, it may become very material to ascertain whether confidence can be reposed in the veracity of his statements; testimony, therefore, to contradict him, or to show that his statements should not be believed, is not to be excluded as hearsay, or as contradicting that which is collateral or irrelative. *State v. Blake*, 25 Maine, (12 Shep.) 350.

13. Hearsay evidence is the deposing on oath to certain facts, which are only known to the witness by the relation of some other person. Bull. N. P. 294.

14. Where the inquiry is into the nature and character of a certain transaction, not only what was done, but what was said by both parties during the continuance of the transaction, is admissible, as being part of the transaction in question; for to exclude it then, might exclude the only evidence the case admits of. Roscoe's Cr. Ev. 17.

15. The term hearsay evidence is used with reference both

to that which is written and to that which is spoken. But in its legal sense, it is confined to that kind of evidence which does not derive its effects solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information. Phil. Ev. 197, 8th ed.

16. Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*. *Sessions v. Little*, 9 N. H. 271.

17. There are some cases in which the declarations of the prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestæ*, as to account for his silence where that silence would operate against him. *United States v. Craig*, 4 Wash. C. C. 729.

18. So to explain and reconcile his conduct. *State v. Ridgely*, 2 Har. & M'Hen. 120.

19. Where a prisoner, indicted for murder, has produced evidence of declarations by the deceased, with a view to raise the presumption that he committed suicide, it is competent for the state to give in evidence the reasons assigned by him for his declaration. *State v. Crank*, 2 Bail. 66.

20. Where the prosecutrix had died before the trial, and without her deposition having been taken, ROLFE, B., received evidence (the prisoner's counsel not objecting) that she had made a complaint, on her return home, of an outrage having been committed upon her, but held, that the particulars of such complaint were not admissible. *Messon's Case*, 9 C. & P. 420.

21. In a case where the prosecutrix was called, but did not appear, and it was objected, on the part of the prisoners, that evidence of recent complaint is receivable only to confirm the prosecutrix's story, and that as her evidence was not before the jury, it could not be confirmed, PARKE, B., rejected evidence of the prosecutrix having made a complaint. *Guttridge's Case*, 9 C. & P. 471.

22. In a case of rape, followed by cutting and stabbing,

the account which the woman gave when she returned home all bleeding, the following morning, of the way in which she had been used by the prisoner, was allowed to be fully laid before the jury, though she had just before been examined herself. *M'Cartney's Case*, 1828, Allison's Prac. Crim. Law of Scotland, 514.

23. When the state of mind, sentiment or disposition of a person at a given period become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to. *Bartholemey v. The People*, 2 Hill, 248.

24. It is not competent for a prisoner, indicted for murder, to give in evidence his own account of the transaction, related immediately after it occurred, though no third person was present when the homicide was committed. *State v. Tilly*, 3 Ired. 424.

25. On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *Commonwealth v. Kent*, 6 Met. 583.

26. In a criminal prosecution for damages, mere naked admissions made by the party libelled are in general incompetent evidence against the people, even to establish facts tending to a justification; otherwise as to conversations or declarations which are part of the *res gestæ*. *Bartholemey v. The People*, 2 Hill, 249.

27. The declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is admissible in evidence after her death, as a part of the *res gestæ*. *Commonwealth v. M'Pike*, 3 Cush. 181.

28. On an indictment for a misdemeanor, the declarations of the defendant were held admissible in evidence when they accompanied, explained and characterized the acts charged. *The State v. Huntly*, 3 Ired. 418.

29. Whenever the bodily or mental feelings of an individual at a particular time are material to be proved, the expression of such feelings, made at or soon before that time, is evidence—of course, subject to be weighed by the jury. *Roulhac v. White*, 9 N. C. 63.

30. The declarations of a party are admissible in his favor when they are so connected with some material act as to explain or qualify it, or show the intent with which it was done. *Russell v. Frisbie*, 19 Conn. 205.

31. In an indictment for larceny, declarations at the time of his arrest by the prisoner as to his claim of ownership to the property taken, are not admissible in evidence. *The State v. Wisdom*, 8 Port. 511.

Insanity.

1. Where, on a trial for murder, the defence sets up his insanity, evidence may be received as to the acts and declarations of the accused, as well before and after as at the time of the homicide. *Lake v. The People*, Parker's Cr. 495.

2. But it is not competent to prove the effect which the prisoner's conduct had on the mind of another person on the day before the homicide, nor the acts nor declarations of the person killed, then made, in the absence of the prisoner. The previously expressed opinion of the person killed is not admissible evidence on the question of insanity, nor would such questions, if living, be permitted to testify to such opinion. *Ib.*

3. If a medical witness has heard only a part of the testimony on which the prisoner's counsel relies to establish his defence, it is erroneous to permit such witness to give his opinion as to the prisoner's sanity, where such opinion is founded on the portion of the testimony so heard by him. *Ib.*

4. To make the opinions of experts admissible, they must be founded on a given state of facts, which should embrace all the facts relied upon to establish the theory claimed. *Ib.*

5. Where insanity is interposed as a defence, its existence must be established by affirmative proof, every person being presumed to be sane till the contrary is proved. *The People v. Robinson*, Parker's Cr. 649.

6. On a trial involving an inquiry as to the sanity of a prisoner, a medical witness cannot be permitted to give his opinion on the case, or on the question of guilt, but only on the question of sanity. *The People v. Thurston*, 2 Parker's Cr. 49.

7. Nor can a medical witness be permitted to give his opinion on the prisoner's sanity, where he has heard only part of the evidence on the subject, and his opinion has been formed on such part of the evidence. *Ib.*

8. A medical witness may give his opinion on a hypothetical statement of facts, and it will be for the jury to judge whether the supposed facts so stated correspond with facts as proved. *Ib.*

9. Opinions of eminent medical witnesses on the subject of insanity, with their statements of the symptoms and evidence of insanity, and of the causes which produce it. *Ib.*

10. Symptoms of poisoning by arsenic, described by physicians, with their opinions on the subject of insanity set forth in the evidence. *The People v. Robinson*, 2 Parker's Cr. 235.

11. Every man is presumed to be sane till the contrary is shown. The burden of proof of insanity, to overcome such presumption, rests upon the accused. *Lake v. The People*, Parker's Cr. 495.

12. Where the question to be determined by the jury is the sanity of a person, both the acts and declarations of the person are evidence, for the purpose of ascertaining the state of mind of the actor. *Ib.*

13. Every person is supposed to be sane till the contrary appears. *The People v. Kirby*, 2 Parker's Cr. 28.

14. On the trial of an indictment for robbing a female of her shoe, in daylight, in the public street of a city, it being proved that the accused had been, for several years, and ever since an injury to his head, which it was supposed had affected his brain, in the habit of taking the shoes of females,

wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner on the side of his mother, with other circumstances tending to establish *monomania*, after hearing the testimony of eminent medical men on the subject, the prisoner was acquitted on the ground of insanity. *The People v. Sprague*, 2 Parker's Cr. 43.

15. The accused must be presumed to be sane till his insanity is proved. The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved. *United States v. McGlue*, 1 Curtis, 3.

16. Experts are not allowed to give their opinion upon a case where the facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon. *Ib.*

17. The defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been laid down by the judges, with regard to the nature and degree of aberration of mind which will excuse a person from punishment, are by no means consistent with each other, or, as it should seem, with correct principle. *Commonwealth v. Rogers*, 7 Met. 500.

18. If, though somewhat deranged, he is yet able to distinguish right from wrong, in *his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts. *Alison's Princ. Crim. Law of Scotland*, 645, 654.

19. To entitle a prisoner to be acquitted on the ground of insanity, he must, at the time of committing the offence, have been so insane that he did not know right from wrong. *R. v. Higginson*, 1 C. & K. 129.

20. On a trial for murder, a physician having stated on examination in chief that the prisoner was insane, he may be asked, on cross-examination, whether, in his opinion, the prisoner knew right from wrong, or that it would be wrong for him to commit murder, rape or arson. *Clarke v. The State*, 12 Ohio, 483.

21. The *onus* of proving the defence of insanity, or in the

case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner. *Alison's Princ. Crim. Law of Scotland*, 659.

22. For the purpose of proving insanity, the opinion of a person possessing medical skill is admissible. *Wright's Case*, Russ. & Ry. 456.

23. A man was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions, to be put by the learned judge to the witnesses for the prosecution to negative the supposition that he was insane; and the judge, also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They however failed in showing that the defence was an incorrect one; on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity. *R. v. Pearce*, 9 C. & P. 667.

Leading Questions.

1. The questions, "State whether or not you examined the horse-tracks towards Crogan's;" and "state whether or not you had any difficulty in following the tracks," are leading and improper. *Hopper v. The Commonwealth*, 6 Gratt. 684.

2. Where, upon the trial of an indictment, the witnesses not under examination were excluded from the court-room, and the question arose in the case, whether a witness offered by the prisoner was or was not a mulatto, it was held competent to examine a person as a witness upon this point who had been present during the trial. *Ib.*

3. It is the universal practice in this state, both in criminal and civil proceedings, to permit a witness, after having been examined in chief, consigned and cross-examined, to be again examined by the party by whom he was introduced, upon points touching which he had not before testified, or to

be subsequently recalled and interrogated in relation to material facts, not before elicited or referred to, either from inadvertence or ignorance of their being within the knowledge of the witness. *State v. Duncan*, 8 R. 562.

4. A leading question is one which directly suggests the answer desired, or which embodies a material fact, and admits of a simple negative or affirmative. *Stringfellow v. The State*, 26 Miss. 157.

5. But if the question propounded relates merely to introductory matter, it should not be objected to, although in form it is leading. *Ib.*

6. A question which does not indicate the answer expected from the witness, but merely directs his attention to the subject in relation to which he is to testify, is not a leading one. A leading question is one which suggests to the witness the answer he is to deliver. *State v. Duncan*, 8 R. 562.

7. After a witness has been regularly sworn, the party who has called him proceeds to examine him in chief, respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggests to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by *yes* or *no*, would not be conclusive on any of the points of the issue, for it is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. *Nicholas v. Dowding & Kemp*, 1 Stark. N. P. C. 81.

8. Upon cross-examination, the witness cannot be asked a leading question in respect to new matter. *Harrison v. Rowan*, 3 Wash. C. C. 580.

9. Upon trial at bar, on its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the court held, that the counsel for the prosecution might ask, in the most direct terms, whether any of the prisoners was the person meant and described by the witness. *Rex v. Watson*, 2 Stark. N. P. C. 128.

10. Where the plaintiff's son, being called as a witness for

his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents, and witnesses were called on the part of the defendant to speak to the contents of the same letter, Lord ELLENBOROUGH ruled that the defendant's counsel might ask one of them, who had first exhausted his memory, by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his lordship, it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Camp. 43.

11. Where a witness of the plaintiff's, in cross-examination, had been asked as to some expression he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them, ABBOTT, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief. *Edmonds v. Walter*, 3 Stark. N. P. C. 7.

12. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied. Held, that a person who was called to prove that the witness had said what he had denied, could not be examined by the counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way, by asking what had passed. *Hallett v. Cousens*, 2 M. & Rob. 238.

13. If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court may deem it right to rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. *Bastin v. Caren*; R. & M. N. P. R. 121.

14. The fact of a witness being an unwilling or adverse

witness, is to be ascertained by the nature of his evidence, his manner of answering and demeanor, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination. *Reg v. Ball*, 8 C. & P. 745.

Presumptive Evidence.

1. Twenty years adverse possession warrants a presumption that the possessor had a deed of the property, and that all acts, necessary to give the deed effect, were done. *Brattle Square Church v. Bullard*, 2 Met. 363; *Commonwealth v. Low*, 3 Pick. 408; *Valentine v. Piper*, 22 Pick. 85; *Melvin v. Locks and Canals*, 16 Pick. 137; S. C. 17 Pick. 255; *White v. Loring*, 24 Pick. 319; *Ryder v. Hathaway*, 21 Pick. 298.

2. Where a license has been granted, it is presumed that the court had the proper evidence before them. *Commonwealth v. Bolkom*, 3 Pick. 281.

3. Where proof was made, that prohibited sales of articles belonging to a trader at his store were made by his clerk, that he knew of the sales and received the pay, such proof does not alone create a legal presumption of the trader's guilt. They would tend strongly to prove that the clerk acted as agent for the trader; but its weight and effect was matter which should have been submitted to the jury for their determination. *The State v. Tibbetts*, 35 Maine, (5 Red.) 81.

4. The fact that a person was employed as a clerk in a store may be inferred from the relative situation of the parties, and the nature of the employment, without proof of any express appointment, either written or verbal. *The State v. Foster*, 3 Foster, (N. H.) 348.

5. Where a person has been absent seven years from the place of his domicil, his death is presumed to have taken place at some time within the seven years, and not in all

cases at the expiration of that period. *The State v. Moore*, 11 Ired. 160.

6. The circumstances should be strong in themselves, should each of them tend to throw light upon and prove each other; and the result of the whole should be to leave no doubt upon the mind that the offence has been committed, and that the accused and no other could be the person who committed it. *United States v. Jones*, 1 Wash. C. C. 372.

7. On a charge of receiving stolen goods with knowledge; finding them secreted in the prisoner's store, in a place convenient for concealment; considerable stolen property being found up stairs; the prisoner, on being questioned, giving no satisfactory account of them; a great quantity of stolen goods being found in his house; with bad character of the accused, were allowed as proof of knowledge. *People v. Teal*, 1 Wheel. C. C. 199, 201.

8. So, buying the goods at a reduced price, they being of a large amount, receiving them of a stranger, throwing them into a trunk in a confused and crowded manner; the trunk being found in a room up stairs, in the prisoner's house, though he kept a store. *People v. Cochrane*, 1 Wheel. C. C. 81, 84.

9. It may be remarked generally, that on a trial, either in civil or criminal cases, the omitting to produce evidence in elucidation, which is in the power of the party or within his peculiar knowledge, shall be holden to turn every doubt against him. 1 Stark. Ev. 34.

10. A wife accompanying her husband in the commission of crime, acts under his coercion, and consequently without a guilty intent. *Rex v. Knight*, 4 Carr. & Payne, 116.

11. A conspiracy may be proved by circumstances, among which are the acts of the parties in doing the injury which is the alleged object of the conspiracy. *Jones v. Becker*, 7 Cowen, 445.

12. The force and tendency of circumstantial evidence to produce conviction and belief, depend also on a consideration of the coincidence of circumstances with the fact inferred, that is with the *hypothesis*, and the adequacy of such coincidences to exclude every other hypothesis. 3 Stark. Ev. 481.

13. In the case of A. being found in possession of stolen goods recently after the larceny of them, and refusing to render any account of them, although the coincidences with the hypothesis of his being the thief be but two, viz., his *possession* and *omission* to account for it, yet the latter excludes the supposition of an honest intention. 3 Stark. Ev. 483, note.

14. Circumstantial evidence is sufficient, and is often more persuasive than the positive evidence of a witness, who may be mistaken; whereas a concatenation and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken or fail to elicit the truth. *United States v. Johns*, 1 Wash. C. C. 372.

15. In cases of homicide, the precaution of Lord HALE seems to be enough for laying the foundation of circumstantial evidence: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead. 2 Hall P. C. 290.

16. Evidence that the keeper of a grocery sold liquor, and that it was drank upon his premises, is presumptive evidence that it was drank with his consent. *Casey v. The State*, 6 Mis. 646.

17. Where an act is unlawful and voluntary, the *quo animo* is inferred, necessarily, from the act itself; and where one does an unlawful act, it is no sufficient justification for him to show that he did not believe it to be unlawful. So held in an indictment for selling spirituous liquors to a slave, contrary to statute. *State v. Presnell*, 12 Ired. 103.

18. A person is presumed to intend the ordinary consequence of his acts; and it devolves upon a person charged with crime to rebut this presumption by evidence of a different intent. *The People v. Orcutt*, Parker's Cr. 252.

19. The nature of presumptions discussed, and violent presumptions, probable presumptions and light or rash presumptions, described and illustrated by examples, and directions given as to their application and as to the weight that should be severally given to them. *The People v. Videto*, Parker's Cr. 603.

20. Where, on a trial at the Oyer and Terminer, the prison-

er called as a witness a woman, by whom he proved that she was living with the prisoner as his mistress and not as his wife, so as to make her a competent witness on his behalf, and then proved by her facts deemed material in the case, and no attempt was made on the part of the public prosecutor to impeach her testimony, it was held, that the prisoner was not at liberty to introduce testimony to sustain her character for truth and veracity. *Colt v. The People*, Parker's Cr. 611.

21. Where there is no evidence before the grand jury, or known to the prosecutor, at the time of finding the indictment for murder, to show what instrument was used to produce the mortal wound, it is proper to charge in the indictment that such wound was inflicted by some instrument to the jurors unknown; and under such an allegation, it is competent for the public prosecutor to introduce evidence to raise a presumption that the wound was caused by a pistol ball; and to prove, for that purpose, that the prisoner had pistols in his possession, and that a ball, propelled by explosion of a percussion cap, would be likely to produce such a wound; or to prove that the prisoner had such pistols, for the purpose of satisfying the jury, if possible, in connection with other evidence in the case, that the prisoner had taken the ramrod from the pistol and driven in into the head of the deceased. *Id.*

22. Proof that stolen goods, or a part of them, were found in the house or possession, or on the person of the prisoner, is presumptive evidence of his having stolen them—sufficient to warrant a conviction, if it be not repelled. This kind of evidence is frequently strengthened by other circumstances, as giving a false account respecting the goods—an endeavor to conceal—an attempt to prevent a search for them, and the like. 1 Phil. Ev. 168.

23. Where the guilty knowledge of the defendant is the point in issue, as where he is charged with uttering a forged note or base coin, a series of similar acts is presumptive proof of guilty knowledge. 1 Moo. C. C. 148.

24. As regards the *effect* of presumptive evidence, the rule, even in a capital case, is, that should the circumstances be

sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on these circumstances as on direct and positive proof, for facts and circumstances cannot lie. 1 Wash. C. C. 372.

25. Presumptive evidence is either violent, probable or light. *Violent* presumption often amounts to full proof, as if one be killed in a house with a sword, and a man was seen to come out of that house with a bloody sword, and no other man was at that time in the house. *Probable* presumption moveth little; that which is *light*, not at all. 3 Black. Com. 371.

26. A presumption of any fact is properly an inference of that fact, from other facts that are known; it is an act of reasoning. *Rex v. Burdett*, 4 B. & A. 161.

27. When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and these are called *presumptions* and not *proofs*; for they stand instead of the proofs of the fact till the contrary be proved. Gilb. Ev. 157.

28. Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place. The legal presumption from flight is against the prisoner, and it lies upon him to rebut it. *Fanning v. The State*, 14 Mis. 386.

29. The presumption that he who is found in possession of stolen goods recently after the theft was committed is himself the thief, applies *only* when this possession is of a kind which manifests that the stolen goods never came to the possessor *by his own act*, or at all events with undoubted concurrence. *State v. Smith*, 2 Ired. 412.

30. Thus, where the defendant and two of his sons were indicted for stealing tobacco, which had been stolen in the night, was found next day in an out-house of defendant, occupied by one of his negroes, and in which the defendant kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proved to be the tobacco that had been stolen; held, that it was error in the judge to charge the jury "that the possession of the stolen tobacco

found on defendant, raised in law a strong presumption of his guilt." The possession of a stolen thing is evidence to some extent against the possessor of a taking by him. Ordinarily, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of considerable time before a possession is shown in the accused, the law does not infer his guilt. *State v. Williams*, 9 N. & C. 140.

31. The accused, even when the stolen goods are found in his possession and under his control, within a short time after the larceny is committed, and a presumption of guilt is raised, is not bound to show to the reasonable satisfaction of the jury that he became possessed of them otherwise than by stealing; the evidence may fall far short of establishing that, and yet create in the minds of the jury a reasonable doubt of his guilt. *State v. Merrick*, 19 Maine, 398.

32. Where stolen property was found in the possession of a person, but sixteen months had elapsed since the larceny, held that the prisoner could not be called on to account for the manner in which it came into his possession. *Anon.*, 2 C. & P. 459.

33. It is to be carefully observed that the mere finding of stolen goods in the house of the prisoner, where there are other inmates capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner. 2 Stark. Ev. 450, 2d ed.

34. The possession of stolen property is sometimes used, not as presumptive evidence of the fact of larceny, but as proof of the commission of another offence. Thus, on a charge of arson, the evidence of the prisoners having been present and implicated in the fact was, that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them. BULLER, J., doubted at first whether such evidence of another felony could be admitted in support of the charge, but as it seemed to be all one act, he admitted it. *Rickman's Case*, 2 East P. C. 1,035.

35. Presumptive or circumstantial evidence is admissible

both in civil and in criminal cases, and in prosecutions of some of the worst species of crimes, is often the most satisfactory and convincing that can be produced. The reasons for this opinion in a comparison between positive and circumstantial evidence. *The People v. Videto*, Parker's Cr. 603.

36. The treatise entitled, "The theory of presumptive proof, or an inquiry into the nature of circumstantial evidence," which is found bound up with the first American edition of Phillips' Evidence, disapproved and declared to be in opposition to the judicial decisions upon that subject; and the eleven cases published in the appendix of that work, for the purpose of supporting that theory by illustration, held to be unauthenticated and unreliable. *Id.*

37. There is a wide difference between presumptions of law and presumptions of facts. The law draws no presumptions, except from facts, which, unexplained, are conclusive of guilt; but presumptions of fact are to be drawn by the jury, and every fact that tends to prove the guilt, or to prove a fact that is evidence of it, is admissible and proper for their consideration. *Baalam v. The State*, 17 Ala. 451.

38. In a criminal case, where the prosecuting attorney, who held office when the indictment was found, came upon the bench when the case was tried, the court does not judicially know that the prosecuting attorney and the presiding judge are the same person. *Shropshire v. The State*, 7 Eng. 190.

39. Where the Supreme Court had adjudged an act of the General Assembly of Tennessee unconstitutional, which established a county, it was held, that a circuit judge had the right, in the trial of a cause, to declare to the jury his judicial knowledge of such decision of the court in the specified case, and the result of such decision in fixing the boundaries of counties. *Cash v. The State*, 10 Humph. 111.

40. As a general rule, Superior Courts will not judicially take notice of the custom, laws or proceedings of inferior courts, whose jurisdiction is limited, unless justice requires it when reversing the judgments of such courts. *March v. Commonwealth*, 12 B. Mon. 25.

41. Courts will not presume any fact that works a forfeiture of an estate. *The State v. Atkinson*, 24 Vt. (1 Dean,) 448.

42. The magistrate, before whom one charged with a criminal offence is brought for examination, being required by the statute to reduce the testimony to writing, the legal presumption is, that he has done his duty, and parol proof of what a deceased witness swore on such examination is inadmissible, until this presumption is rebutted, or the absence of the written evidence otherwise accounted for. *Davis v. The State*, 17 Ala. 415.

43. Where a court of general jurisdiction has authority to do a particular thing, every thing preliminary will be presumed to have been done; as in case of an appointment of surveyors after notice, an order of the Court of Common Pleas in New-Jersey, stating that "the court was satisfied due and legal notice of this application has been given," it was held, with the proper intendment, to have been a compliance with the statute, that the order should pass, on due proof being made that notice has been given according to law. *The State v. Lewis*, 2 N. J. 564.

44. It will be presumed that inferior courts have not erred, until the contrary is clearly shown. *The State v. Farish*, 23 Miss. (1 Cush.) 483.

45. The act chartering a town is a public law, of which the courts will judicially take notice, and therefore need not be averred in pleading, or given in evidence to establish the existence of the corporation. *The State v. The Mayor and Aldermen of Murfreesboro'*, 11 Humph. 217.

46. The courts of the United States take judicial notice of treaties made by the United States with foreign governments, and of the public acts and proclamations of those governments and their publicly authorized agents, in carrying those treaties into effect. *United States v. Reynes*, 9 How. (U. S.) 127.

47. The courts of the United States take judicial notice of the Spanish laws which prevailed in Louisiana before its cession to the United States. *United States v. Turner*, 11 How. (U. S.) 663.

48. A person accused is not bound, in order to avoid a presumption against him arising from circumstantial evidence, to produce as witnesses persons who may by possibility have knowledge on the subject. He need only produce those who are proved to have been so circumstanced as to justify the conclusion that they must have knowledge which, if divulged, would throw light on the subject. *The People v. Mc Whorter*, 4 Barb. Sup. Ct. 438.

Substance of the Issue to be Proved.

1. On an indictment for an assault with intent to murder, there may be a conviction of an assault simply. *State v. Coy*, 2 Atk. 181; *Stewart v. State*, 5 Ohio, 242.

2. On an indictment for murder, there cannot be a conviction of an assault with intent to murder, nor *vice versa*. *Commonwealth v. Roby*, 12 Pick. 496.

3. Where, on an indictment for a rape, the prisoner was convicted of an assault with intent, &c. *Cooper's Case*, 15 Mass. 187.

4. Nor of petit larceny on an indictment for horse stealing. *State v. Spurgin*, 1 M'Cord, 252.

5. Nor upon an indictment for stealing can there be a conviction for receiving, &c. *Russ v. The State*, 1 Blackf. 391; *The State v. Shepard*, 7 Conn. 54; *State v. Taylor*, 2 Bail. 49.

6. A defendant cannot be convicted of an inferior degree of the same offence charged in the indictment, unless the lesser offence is included in the allegation of the indictment. *The State v. Shoemaker*, 7 Miss. 177.

7. Under an indictment for assault and battery with intent to kill, the defendant may be convicted of a simple assault and battery. *The State v. Stedman*, 7 Post. 495.

8. Under an indictment with intent to commit murder or mayhem, the defendant cannot be convicted of an assault with intent to commit a bodily injury. *Carpenter v. The People*, 4 Scam. 197.

9. Under an indictment for procuring an abortion of a

quick child, which is a felony by statute, the prisoner may be convicted of a misdemeanor, if the child were not quick. *The People v. Jackson*, 3 Hill, 92.

10. So on an indictment for rape, one may be found guilty of incest. *The Commonwealth v. Goodhue*, 2 Met. 193.

11. So on an indictment for manslaughter, one may be found guilty of an assault and battery. *The Commonwealth v. Drum*, 19 Pick. 479; *The Commonwealth v. Hope*, 22 Pick. 1.

12. Where a person or a thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same as that described in the indictment. 3 Stark. Ev. 1,531, 1st ed.

13. An indictment for coining alleged possession of a die made of iron and steel. In fact, it was made of zinc and antimony. The variance was held fatal. *Dorsett's Case*, 5 Rogers' Rec. 77.

14. An allegation in an indictment, which is not impertinent or foreign to the cause, must be proved; though a prosecution for the offence might be supported without such allegation. *United States v. Porter*, 3 Day's Cases, 283.

15. The court will be more strict in requiring proof of the matters alleged in a criminal than in a civil case. *Ib.*

16. An indictment for stealing a dead animal should state that it was dead; for upon a general statement, that a party stole the animal, it is to be intended that he stole it alive. *Edward's Case*, Russ. & Ry. 497.

17. The prisoner being indicted under the 9th Geo. I., c. 22, for killing "certain cattle, to wit, one *mare*," the evidence was, that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain *mare*," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed, being a *colt* generally, without specifying its sex was not sufficient to support the charge of killing a *mare*. *Chalkley's Case*, Russ. & Ry. 258.

18. In a larceny of a *gray horse*, proof that it was a *gray*

gelding, the variance held fatal. *Hooker v. The State*, 4 Ohio, 350.

19. The acceptance of the name of property governs the description. *Commonwealth v. Wenty*, 1 Ashmead, 269.

20. A charge that defendant set up and kept a faro-bank, at which *money* was bet, lost and won, is not sustained by proof that *bank notes* were bet, lost and won. *Pryor v. The Commonwealth*, 2 Dana, 298.

21. When the name alleged was *Harris*, the true name *Harrison*, though he was sometimes called by the former, it was held to be no variance. *State v. Grant*, 1 Overt. 434.

22. In an indictment for larceny, wherein the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson, of Addison," and the proof was, that there was in that town two men of that name, father and son, and that the property belonged to the son, who had usually written his name with junior attached to it, it was held, that junior was no part of the name, and that the ownership, as alleged in the indictment, was sufficiently proved. *State v. Grant*, 22 Maine, 171.

23. When surnames, with a prefix to them, are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient. *State v. Kean*, 10 N. H. 347.

24. An indictment which alleges that the defendant assaulted and robbed A., and being armed with a dangerous weapon, did strike and wound him, is not proved, as to the wounding, by evidence that the defendant made a slight scratch on A.'s face, by rupturing the cuticle only, without separating the whole skin; nor as to the striking, by evidence that the defendant put his arms about A.'s neck, and threw him on the ground, and held him jammed down to the ground. *Commonwealth v. Gallagher*, 6 Met. 565.

25. An indictment for an assault with a "basket knife," with intent to kill, is supported by evidence of an assault with a "basket iron." The kind of instrument in such case is immaterial, if the nature of the injury calculated to be produced by each be of the same description. *State v. Darne*, 11 N. H. 271.

26. In perjury, charged to have been committed at the

Circuit Court, held on the 19th of May, and the record shows the court to have been held on the 20th of May, the variance is fatal. *United States v. M'Neal*, 1 Gallison, 387.

27. Where bills of exchange and other documents, not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence. *Coxon v. Lyon*, 2 Camp. 307.

28. Where time is of the essence of the offence, as in burglary, or the like, the offence must be proved to have been committed in the night time, although the day on which the offence is charged to have been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. Archb. C. P. 96, 9th ed.

29. Where an indictment alleges that the property embezzled *was possessed by C. R. B., and by him delivered to the defendant*, proof that it was delivered by C. R. B. to some *one* acting *for*, and by the *latter*, to defendant, will support the allegation in the indictment. *State v. Hinckley*, 38 Maine, 20.

30. In burglary it is not necessary to prove strictly the hour or day as laid, if it be proved to have taken place in the night time. 2 East P. C. 513.

31. Where it was averred that a barn was set fire to in the night time, it was holden not necessary to prove it so, for the averment was unnecessary. 2 East P. C. 1,021, 1,035.

32. Where several offences are described as having been committed on such a day, and divers days and times afterwards, evidence cannot, it seems, be admitted to prove more than offence prior to the day named. 1 Saund. 24, n.

33. The first general rule respecting evidence, whether in civil or criminal cases, which we shall notice, is that the *best* evidence must be given of which the nature of the thing is capable. 9 Cowen, 30.

34. Another general rule is, that the evidence shall *be confined to the point in issue*. Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Nor is it competent for

the prosecutor to give evidence of facts tending to prove another distinct offence, for the purpose of raising an inference that the prisoner has committed the offence in question. Roscoe's Cr. Ev. 57.

Weight and Conclusiveness of Proof.

1. Where an indictment for a capital offence is supported solely by circumstantial evidence, it should be so strong as to exclude every supposition inconsistent with the defendant's guilt. *Sumner v. The State*, 5 Blackf. 579.

2. In such case it is not necessary, in order to justify a verdict of guilty, to prove that the defendant had a motive to commit the crime alleged, nor that the evidence should produce an absolute certainty upon the minds of the jury. *Ib.*

3. Neither a plea of guilty, in a criminal prosecution, nor the judgment founded upon it, is conclusive against the defendant in a civil action. *Clark v. Irvin*, 9 Ham. 131.

4. Such plea is like any other confession, and may be controverted. *Ib.*

5. An averment, in an indictment for a riotous assault upon an officer in the lawful discharge of the duties of his office, that he was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny, is supported by proof that the officer was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny in another state, and of being a fugitive from justice.

• • *The Commonwealth v. Tracy*, 5 Met. 536.

6. The exculpatory oath authorized by section 17 of the statute of 7th June, 1806, to be taken by a party prosecuted under that statute for the cruel treatment of a slave, in the absence of any witness, is not conclusive of the innocence of the accused, but must be received and weighed as other evidence, and may be rebutted. *State v. Morris*, 4 An. 177.

7. Where the direct charge rests for its proof upon the testimony of accomplices, it is sufficient to convict if it be corroborated by the evidence of credible witnesses, although

such evidence has only an indirect tendency to establish the commission of the particular offence charged. *The People v. Davis*, 21 Wend. 309.

8. On a trial for murder, proof that a written paper, found near the body of the deceased, was given to the prisoner's son for the use of his father, is a sufficient ground for giving the paper to the jury, with instructions to disregard it, unless satisfied that it came from the prisoner's possession. *The State v. Arthur*, 2 Dev. 217.

9. An allegation in an indictment for illegal voting, &c., that a meeting of the inhabitants of the town of A. was duly holden, is proved by evidence that a meeting of the inhabitants of A. who were qualified to vote was duly holden. *The Commonwealth v. Shaw*, 7 Met. 52.

10. It is not sufficient to invalidate the evidence of a witness, on the trial of a capital case, that it varied slightly, as to a point of time, from her affidavit before the magistrate, she being an ignorant person, and her attention not being called to the importance of exactness; nor that she omitted, in her affidavit, to state a fact testified to by her at the trial, there being no contradiction in the affidavit of such fact. *The State v. M'Elmurray*, 3 Strobb. 33.

11. Where, upon the trial of an indictment for arson, the evidence was, that the prisoner had bank notes similar to those stolen from the house when the arson was committed, and that he gave contradictory accounts of the mode in which he obtained them, an instruction to the jury that these contradictions were evidence to prove that he did not come honestly by them, is not erroneous. *The State v. Gillis*, 4 Dev. 606.

12. If the jury, in making up their minds from circumstantial evidence, in a capital case, have a rational doubt as to the existence of any one of the material circumstances attempted to be proved, that circumstance ought not to have any influence with them in making up their verdict. *Sumner v. The State*, 5 Blackf. 579.

13. Where an indictment is supported solely by circumstantial evidence, although the jury believe, from the evidence, that it was possible that some other person than the

defendant committed the crime, it does not necessarily follow that there must be a verdict of acquittal. *Sumner v. The State*, 5 Blackf. 579.

14. Conduct exhibiting satisfactory indications of guilt is not sufficient to sustain a conviction, unless there be also satisfactory evidence that a crime has been committed; as in case of alleged larceny, that the property has been feloniously taken and carried away. *Tyner v. The State*, 5 Humph. 383.

15. The question whether a person was held to service under the law of Virginia, is partly a question of *status*, and partly a question of property; and in either aspect, evidence that the person was, in point of fact, held and treated as a slave in Virginia, is admissible, and if not controlled, sufficient evidence for the jury to find that he was held to service under the laws of that state. *United States v. Morris*, 1 Curtis, 24.

16. Recitals in the preamble of a private statute are *prima facie* evidence of the matters recited, as between the person for whose relief the statute was passed and the state. *The State v. Beard*, 1 Carter, (Ind.) 460.

17. Where three witnesses, who professed to be persons of skill, testified to the value and genuineness of a bank note, and it was proved that the prisoner passed the same for goods, and received change, it was held that this was ample proof of the value and genuineness of the note, and *prima facie* evidence of the existence of the bank which purported to have issued it. *Crawford v. The State*, 2 Carter, (Ind.) 132.

18. The testimony of near relations for each other, in criminal cases, is to be regarded with suspicion; and an instruction by the court to that effect, where a mother was offered by her son, who was on trial, to prove an *alibi*, was held to be correct. *The State v. Nash*, 8 Ired. 35.

19. On the trial of criminal cases, mathematical or metaphysical certainty, or direct and irrefragible evidence is not necessary; all that the law requires is moral certainty; that is, that the jury, whether the evidence be positive or presumptive, should be satisfied of the defendant's guilt; and, in such case, a mere vague conjecture or possibility of his

innocence, or any thing short of a reasonable doubt, will not justify his acquittal. *Giles v. The State*, 6 Geo. 276.

20. There is no positive rule of law, that a jury may not convict upon the unsupported testimony of a *particeps criminis*. *State v. Cunningham*, 31 Maine, (1 Red.) 355.

21. Although the conversion of property is not proof of an original felonious design in obtaining possession of it, yet it is a circumstance which the jury may consider in determining the original intent. *Long v. The State*, 1 Swan, (Tenn.) 287.

CRIMINAL EVIDENCE.

Witnesses.

- (a.) *Accomplices and Co-Defendants.*
 - (b.) *Competency, how Restored.*
 - (c.) *Examination of Witness.*
 - (d.) *Husband and Wife.*
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(a.) *Accomplices and Co-Defendants.*

1. Upon the trial of an indictment, an accomplice in the commission of the offence is a competent witness for the prosecution; and the testimony of a witness thus situated, will, if the jury are fully convinced of its truth, warrant the conviction of the defendant, though it be uncorroborated by other testimony. *The People v. Costello*, 1 Denio, 53.

2. It is most proper to acquit, where the testimony of an accomplice is not corroborated in material circumstances. *Commonwealth v. Grant*, Thacher's Crim. Cas. 438.

3. Where the direct charge rests for its proof upon the testimony of accomplices, it is sufficient to convict if it be corroborated by the evidence of credible witnesses, although such evidence has only an indirect tendency to establish

the commission of the particular offence charged. *The People v. Davis*, 21 Wend. 309.

4. The evidence of an accomplice is altogether for the jury, and they, if they please, may act upon it without any confirmation of his statement. *State v. Brown*, 3 Strobb. 508; *State v. Cunningham*, 31 Maine, 355.

5. Though a *particeps criminis* is not an incompetent witness, the court should instruct the jury not to convict of felony on his uncorroborated testimony; and such corroboration should be in facts tending to establish the guilt of the accused. *Ray v. State*, 1 Iowa, (Greene,) 316.

6. An accomplice should not be admitted as a witness without a previous order from the court, made on an application, showing that there is no other person by whom the offence can be proved, that the witness is not more guilty than the person on trial, and that his testimony can be substantially corroborated. *Id.*

7. When the accused is found guilty on the uncorroborated testimony of an accomplice, it affords good cause for a new trial. *Id.*

8. If an accomplice be admitted to testify, and appear to have acted in good faith in giving testimony, the government is bound in honor to discharge him. *United States v. Lee*, 4 M'Lean, 103.

9. An accomplice who has testified to the defendant's guilt, cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by the defendant, though made at the same time and in the same conversation. *Kinchelow v. The State*, 5 Humph. 9.

10. An accomplice is a competent witness, and may be examined, if he is willing, for his co-defendant in the same indictment, if tried separately; or if he has pleaded guilty or been separately convicted, and judgment has not been rendered. *Garrett v. The State*, 6 Mis. 1.

11. One charged as an accomplice was proved to have been concerned in the commission of the felony for which the prisoner was indicted. After this proof, in corroboration of his testimony as an accomplice, it was held competent to prove any act or declaration of his which went to show that

he and the prisoner did commit the felony. *State v. Ford*, 3 Strobbh. 517, note.

12. Defendants jointly indicted for a riot cannot be witnesses for or against each other, until they are discharged for the prosecution, or convicted. *The State v. Mooney et al.*, 1 Yerg. 431.

13. A prisoner who, after a false representation made to him by a constable in jail, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession, and the conviction was approved by all the judges. *Commonwealth v. Knapp*, 10 Pick. 478.

14. Where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it is regular, before the witness is attacked, to call another witness to prove that the first had related the facts disclosed in his evidence, immediately after they happened, and to state other confirmatory facts. *The State v. Twitty*, 2 Hawks, 449.

15. Though a *particeps criminis*, called as a witness for the commonwealth on the trial of his accomplice, voluntarily give evidence, and fully, candidly and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right to a pardon for his own guilt, and, therefore, no right to demand a continuance of his cause, until he can have an opportunity to apply to the executive for such pardon. *Dabney's Case*, 1 Robinson, 696.

16. Accomplices are admitted to give evidence under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth; that is, of all the offences about which they might be questioned, and of all their associates in guilt. This implied promise arises from the consideration, that the witness, who is not bound to criminate himself, does so to discover greater offenders; and upon performance of the condition to the satisfaction of the court,

he acquires an equitable title to a pardon. *People v. Whipple*, 9 Cowen, 707.

17. Where it appeared that a prisoner had been insane, after conditional pardon was granted, the court, upon his being seized and brought up for sentence, discharged him, upon condition of his departing within the same period originally limited in the pardon. *The People v. James*, 2 Caines, 57.

18. An accomplice, separately indicted, is competent as a witness for or against another indicted for the same offence. To constitute an accomplice, the person charged as such must have an intention of committing the crime. Mere apparent concurrence is not enough. *United States v. Henry*, 4 Wash. C. C. 428.

19. Where an accomplice received a promise from the attorney-general, that he should not be prosecuted if he would become state's evidence and make a full disclosure, and upon such a promise he made a confession, but afterwards refused to testify, he was put upon his trial, and this same confession was held admissible in evidence against him. *The Commonwealth v. Knapp*, 10 Pick. 477.

20. The law confesses its weakness, by calling in the aid of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate. *People v. Whipple*, 9 Cowen, 707.

21. On the trial of an indictment for adultery, a *particeps criminis* is not a competent witness, on the ground that no person shall be allowed to testify his own guilt or turpitude to convict another. *State v. Annice*, N. Chip. 9.

22. In civil and criminal suits, persons may be witnesses against their accomplices, because their testimony tends to suppress fraud and injustice; and for the same reason, witnesses, whether subscribing witnesses or others, may disclose a fraud. *Churchill v. Suter*, 4 Mass. 156.

23. On trial of an indictment for usury, the borrower is a

competent witness for the commonwealth, if he is not entitled to a moiety of the penalty as informer, notwithstanding he has never paid the money borrowed. *Commonwealth v. Frost*, 5 Mass. 53.

24. Where several persons are jointly indicted, one is not a competent witness for another, without being first acquitted or convicted; and it makes no difference whether the defendants plead jointly or separately. *The People v. Bill*, 10 Johns. 95.

25. Where two were jointly indicted for larceny, and being separately arranged, pleaded and were tried separately, it was held, that a party in the same indictment cannot be a witness for his co-defendant, until he has been first acquitted, or, in some cases, convicted, whether the defendants be jointly or separately tried. *Campbell v. The Commonwealth*, 2 Virg. Cas. 314.

26. Where several persons have entered into the same criminal design, the acts or declarations of one of them, in furtherance of the general object, are admissible in evidence against all the confederates. *State v. Hogan*, 3 An. 714.

27. But where an information is filed against two persons, who are tried together for the same offence, without any evidence to establish a previous combination, the confessions of one prisoner are inadmissible in evidence against the other; they will not be allowed to affect any one but the person who made them. *Id.*

28. It is discretionary with the judge of the first instance to direct the acquittal of one of several prisoners, on trial for larceny and receiving stolen goods, that he may testify on the trial of the rest, if, in his opinion, the charge against him be unsupported. *State v. McLane*, 4 An. 435.

29. Where one is indicted jointly with his accomplices, it is in the discretion of the state's attorney to try the prisoners separately, and use the accomplice or not, on trial, as a witness; but the prisoners have no such right of election for such a purpose, because the accomplice jointly indicted is not competent for them though they sever. *State v. Calvin*, R. M. Charl. 151, 169.

30. Two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offence, but not as to the identity of the prisoners; and the judges were unanimously of opinion that the conviction was good, upon the general ground already mentioned, namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice. *Rex v. Atwood, Leach*, 521.

31. It is clearly unnecessary that the accomplice should be confirmed in *every circumstance* which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. The rule on the subject which has generally been laid down is, that if the jury are satisfied that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks truth in other parts, as to which there may be no confirmation. *Rex v. Barnard*, 1 Carr. & Payne, 88.

32. In respect to the prisoner's right to have one jointly indicted with him sworn as a witness in his behalf, he must in all cases, whether he be tried jointly with or separate from the witness, who has not even been arraigned, wait for a conviction or acquittal of the witness. *The People v. Williams*, 19 Wend. 377.

33. If there be no evidence against him, the court may direct an acquittal, or order the defendant to be discharged. *State v. Blennerhassetts*, Walker, 7, 16.

34. One convicted of an infamous offence is a competent witness until after sentence. *United States v. Dickinson*, 2 M'Lean, 325.

35. A conviction of larceny before a justice of the peace, in a case within his jurisdiction, and a performance of the sentence, render the convict an incompetent witness, although the complaint on which the justice proceeded was so defective that judgment might have been arrested or reversed on error. *The Commonwealth v. Keith*, 8 Met. 531.

36. In South Carolina, a witness cannot be discredited by

evidence of his having been guilty of larceny. *Free v. The State*, 1 M'Mullan, 494.

37. Where two persons are jointly indicted for housebreaking, and one of them pleads guilty, he is a competent witness, before sentence, on the trial of the other. *Commonwealth v. Smith*, 12 Met. 238.

38. Upon the trial of an indictment, an accomplice in the commission of the offence is a competent witness for the prosecution; and the testimony of a witness thus situated will, if the jury are fully convinced of its truth, warrant the conviction of the defendant, though it be uncorroborated by other testimony. *The People v. Costello*, 1 Denio, 83.

39. The uncorroborated testimony of an accomplice should be received with great caution, and the court should always so advise the jury; but they are not to be instructed that, in point of law, a conviction cannot be had upon such testimony. *Ib.*

(b.) *Competency, how Restored.*

1. The competency of a person, whose evidence had been rendered inadmissible by conviction, was restored by the king's pardon, which had the effect of discharging all the consequences of the judgment. *Hoffman v. Carter*, 2 Whart. 453.

2. Where a convict has served out his time, his competency may be restored at any time after by a pardon. *United States v. Jones*, 2 Wheeler's C. C. 451.

3. A person having been convicted of forgery, and sentenced to the state prison for life, was pardoned by the governor. The pardon contained a proviso that nothing in it should be construed "so as to relieve the prisoner of and from the legal disabilities to him, from the conviction, sentence and imprisonment, other than the said imprisonment." This proviso was held to be repugnant to the pardon itself, and was rejected, and it was held that the prisoner was

freed from all legal disabilities, and was a competent witness. *The People v. Pease*, 3 Johns. 333.

4. Though the pardon of one convicted of felony will in general restore his competency as a witness, yet the conviction may still be used to affect his credit. *Baum v. Clause*, 5 Hill, 196.

5. The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it. If he does not, in case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect. *Flavill's Case*, 8 Watts & Serg. 197.

6. A convict in a foreign country or a sister state is held competent in Massachusetts. *Commonwealth v. Green*, 17 Mass. 514.

7. But the record is admissible to affect his credit. *Commonwealth v. Knapp*, 9 Pick. 497.

8. A conviction of a crime in another state is not admissible in evidence for the purpose of impeaching the credit of a witness. But a conviction in another state of a crime, which, by the laws of that state, disqualifies the party from being heard as a witness, and which, if committed here, would have operated as a disqualification, is sufficient to exclude him from testifying here, in the same manner as if it had been committed and the conviction had taken place in this jurisdiction. *Chase v. Blodgett*, 10 N. H. 22.

9. The record of a conviction of petty larceny in another state will not render the person convicted incompetent to testify in Virginia. *Uhl v. Commonwealth*, 6 Gratt. 706.

(c.) *Examination of Witness.*

1. On the primary examination of the witness, or as it is generally called, his examination in chief, the party producing is bound at his peril to ask all material questions in the first instance; and if he omits this, it cannot be done in reply.

No new question can be put in reply unconnected with the subject of the cross-examination, and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness. 1 Stark. Ev. 150; 1 Monroe, 115.

2. Where a witness is competent *in chief*, he must be sworn *generally* in the cause, although his examination be confined to only a particular or incidental fact, and although the evidence may be addressed to the court instead of the jury. And it is not allowable that he be *specially* sworn to answer such questions as shall be put to him in relation to any particular matter. It is otherwise where a party to the record is sworn to prove the loss or destruction of a paper. 4 Wend. 369.

3. A deaf and dumb person may be examined, through an interpreter, by finger signs, even in capital cases. Yet, when the witness can write, the better mode, because the more certain, is to require him to write his answer. 8 Conn. 93, 99.

4. The party may ask any questions, even respecting matters communicated in professional confidence; for if the opposite party have brought forward their solicitor or counsel, they have broken the ties which bound him to silence. 1 Chit. Cr. L. 621.

5. The questions must not assume facts to have been proved, nor that particular answers have been given contrary to the facts. *Ib.*

6. Nor can the witness be asked a leading question in respect to new matter. 3 Wash. C. C. 580.

7. In cross-examining a witness, you cannot state to him the contents of a letter, and then ask him if he ever wrote such a letter; but you should show him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may show him part of the letter, and ask him if he wrote that part, but if he do not admit that he wrote it, you cannot then proceed to examine him as to the contents of the letter. 2 Brod. & Bing. 286.

8. Nor, even if he admit it to be his handwriting, can you question him whether statements such as you suggest to him are contained in the letter, but the entire letter must be given in evidence. 2 Brod. & Bing. 288.

9. If, on cross-examination, the defendant's counsel put a paper into the witness' hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence, and the opposite counsel may ask the witness when it was written, without being bound to put it in. 2 Carr. & Payne, 603.

10. It is well settled that questions not relevant may be put to a witness for the purpose of trying his credibility; but in such case the party cross-examining must be satisfied with his answer, and cannot afterwards adduce evidence to contradict him. 8 Greenleaf, 42; 7 Conn. 66.

11. The questions upon the cross-examination should all be such as arise out of the evidence given by the witness on his examination in chief, or are calculated to elicit the witness' title to credit. Arch. Cr. Pl. 166.

12. If a witness, upon his cross-examination, admit his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examining the witness, is confined to such questions as may elicit the meaning of the expressions and the motives of the witness for using them. But where a witness deposes to certain expressions being used by a party to the cause, the counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred; because the expressions are given in evidence, in such a case, as an admission of the party, and the whole of the admission should be taken together. 2 Brod. & Bing. 294.

13. If a witness, whose name is on the back of an indictment, is called, merely to allow the prisoner to cross-examine him, any question put by the prosecutor's counsel afterwards must be considered as a re-examination, and nothing can be asked which does not arise out of the cross-examination. 4 Carr. & Payne, 220.

14. It being material, in the interest of justice, that the motives and prejudices, as well as the means of knowledge

of a witness, should be laid before a jury, great latitude is allowed in his cross-examination. But this latitude is necessarily, to a certain extent, confided to the discretion of the judge of the first instance. *State v. Brown*, 4 An. 505.

15. A jury will not be authorized to infer the existence of any bias or prejudice on the part of a witness against a prisoner, from the fact that the witness, though not an officer of the peace, and without any warrant, and not summoned by any officer to aid in arresting the prisoner, had taken great pains to do so.

16. Where, upon the trial of an indictment, the witnesses not under examination were excluded from the court-room, and the question arose in the case, whether a witness, offered by the prisoner, was or was not a mulatto, it was held competent to examine a person as a witness upon this point, who had been present during the trial. *Id.*

17. Where a party puts a leading question to his own witness, it must be objected to at the time, specifically, or it will not avail him on error. *People v. Lohman*, 2 Barb Sup. Ct. 216.

18. A witness cannot be permitted to read his evidence, but may refresh his memory from any book or paper made by himself at the time the fact occurred, or shortly after, if he can afterwards swear to the fact from his *recollection*; but if he can swear to it only because he finds it entered there, the book or paper must be given in evidence. 1 Phil. Ev. 289.

19. Where a witness is called merely to produce a document, but not sworn, he is not subject to cross-examination. *Moo. & Mal.* 514.

20. Where a witness, called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held, that the opposite party was not entitled to cross-examine him. 1 Crompt. Mee. & Ros. 94.

21. It rests in the discretion of the court before whom a trial is had, whether or not to re-examine a witness after the lapse of a day, and after the examination of other witnesses; or after a cause has been summed up, and the jury charged. 19 Wend. 570.

22. As a general rule, it is not competent, in support of the testimony of a witness, for the party calling him to prove that he has made declarations out of court corresponding with his testimony in court. The exceptions to this rule stated. *The People v. Finnegan*, Parker's Cr. 147.

23. And this rule is applicable to cases where an attempt is made, on a cross-examination, to throw doubts on the testimony of a witness, as well as cases where other witnesses have been called and examined to contradict the statement of the witness. *Id.*

24. It is not collateral but relevant to the main issue to inquire into the motives which influence a witness in giving his testimony, and a party examining a witness in regard to them, is not bound by his answers, but may contradict him. *The People v. Austin*, Parker's Cr. 154.

25. A sufficient foundation is laid for such contradiction, if the attention of the witness has been directed to the time, place and circumstances attending an alleged statement made by him; and the name of the person to whom he may have made it need not be mentioned, if it was not necessary to enable him to know to what remark his attention was directed. *Id.*

26. The possession, by a prisoner, of an unanswered letter, found in his pocket, at the time of his arrest, is not, of itself, evidence of the contents, and it cannot be read in evidence against him on the trial. *The People v. Green*, Parker's Cr. 11.

27. The maxim, *qui tacet, consentire videtur*, is not applicable to such a case; nor is it generally applicable, except to verbal conversations and to certain communications in writing in mercantile transactions. It cannot be applied to facts stated in a letter which a party is not bound or interested to answer. *Id.*

28. Where a party has called a witness, and proved by him a conversation had with the opposite party, the party whose conversation has been proved cannot, on cross-examination, prove by the witness a subsequent conversation between the party cross-examining and the witness, which took place two or three hours after the first conversation, though such sub-

sequent conversation was upon the same subject as the first conversation and in explanation of it. *Ib.*

29. And though the party calling the witness proves the fact that there was a subsequent conversation, that does not entitle the party cross-examining the witness to prove what was said at such subsequent conversation. *Ib.*

(d.) *Husband and Wife.*

1. Where two defendants are jointly indicted for an assault, and one is defaulted on his recognizance, his wife is a competent witness for the other. *The State v. Worthing*, 31 Maine, (1 Red.) 62.

2. A wife can be against her husband in a criminal proceeding only when he is charged with committing or threatening an injury to her person. Upon an indictment against the husband for using criminal means, subornation of perjury, to wrong her in a judicial proceeding, she cannot be a witness on the part of the people. *The People v. Carpenter*, 9 Barb. Sup. Ct. 580.

3. On the trial of an indictment against a free woman of color, for leasing a house, to be kept as a bawdy-house, a slave who cohabits with her as her husband is a competent witness for her. *Coleman v. The State*, 14 Mis. 157.

4. During the trial of five defendants, on an indictment for an assault and battery, the counsel for the defendants moved that the wife of one of them might be examined as a witness for the other four, but the court ruled unanimously that she could not be examined. To have had the benefit of her testimony, they should have moved to be tried separately from the husband, which the court would have granted, had this been assigned as a reason for the motion. *Commonwealth v. Eastland et al.*, 1 Mass. 15.

5. In one case the court refused to hear the husband as a witness against one indicted for larceny jointly with his wife, though she was not taken, and the district-attorney entered a *nolle prosequi* as to her, for perhaps her husband might dis-

close enough to require that a bench warrant should issue against her. *The People v. Colbern*, 1 Wheel. C. C. 479.

6. On an indictment for a conspiracy in inveigling a young girl from her mother's house, and procuring the marriage ceremony to be recited between her and one of the defendants while she was intoxicated, the girl was held to be a competent witness to prove the facts. *Respublica v. Hervice*, 2 Yeates, 114.

7. In the case of Perry, tried on an indictment for a forcible marriage, the wife was received as a witness for her husband, to prove that the elopement and marriage were voluntary. *Macnally's Ev.* 181.

8. The declarations (deposition) of a wife *in extremis* are admissible against the husband, charged with murder. *Pennsylvania v. Stoops*, Addis. 381.

9. On the trial of an indictment of a man for adultery, the husband of the woman with whom the adultery is alleged to have been committed is not a competent witness to prove the adultery. *State v. Welsh*, 26 Maine, (13 Shep.) 30.

(e.) *Impeachment and Support of Witness.*

1. A witness who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witnesses sought to be discredited, before he can be heard to speak of his own opinions or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness. *State v. Parks*, 3 Ired. 296; *State v. O'Neal*, 4 Ired. 88.

2. Where testimony is offered to impeach the general character of a witness for truth, the inquiries are not limited to the character of the witness prior to the suit, but extend to the time of the examination of the witness. *State v. Howard*, 9 N. H. 485.

3. The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from general reputation, the person testifying would believe such witness

under oath as soon as men in general. *State v. Howard*, 9 N. H. 485; *Uhl v. The Commonwealth*, 6 Gratt. 706.

4. Where a witness is sought to be impeached on the ground of his bad character, and the persons called for that purpose testify that they are acquainted with his *general character*, they may then be asked, whether from such general character they would believe the witness on oath; and this though they expressly disclaim all knowledge of the witness' character for truth and veracity. *Johnson v. The People*, 3 Hill, 178.

5. On cross-examination, inquiries as to the means of knowledge of the character of the witness—the origin of reports against him—how generally such reports have prevailed—and from whom and when he heard them, are admissible. *State v. Howard*, 9 N. H. 485.

6. Where, upon the trial of an indictment, a material witness for the prisoner, on his cross-examination by the counsel for the prosecution, admitted that he had been complained of and bound over upon a charge of passing counterfeit money, held, that in answer the prisoner was entitled to give evidence of the witness' good character for truth. *Carter v. The People*, 2 Hill, 317.

7. On the trial of an indictment for a rape, alleged to have been committed on board of a vessel, the prisoner attempted to discredit the testimony of the complainant: 1. By showing, on cross-examination, that her story was improbable in itself; 2. By disproving some of the facts to which she testified; 3. By evidence that her conduct, while on board the vessel and afterwards, was inconsistent with the idea of the offence having been committed; and 4. By calling witnesses to show that the account which she had given of the matter out of court did not correspond with the statements under oath. Held, evidence of her good character inadmissible in reply. *The People v. Hulsa*, 3 Hill, 309.

8. It has been held, in North Carolina, that the Attorney-General may produce evidence to discredit a witness for the commonwealth. *State v. Morris*, 1 Hayw. 438.

9. What a person says, when examined as a witness in a legal proceeding, may be used in evidence against him; but

the statements or oath of a party accused cannot be given in evidence. *The People v. Hendrickson*, Parker's Cr. 406.

10. Where, on the trial of a party for the murder of his wife, it appeared that the prisoner had been examined as a witness before the coroner's inquest, on the evening subsequent to the death, and that he had not then been charged or accused of the crime, and that his statements, then made under oath, were free and voluntary, such statements were held to be receivable in evidence against him. *Ib.*

11. A witness may be interrogated as to the state of his feelings towards a party, in order to show the bias under which he testifies; it is not admissible, however, to inquire into the cause of his hostility. *Bishop v. The State*, 9 Geo. 121.

12. The rule that if a witness testifies falsely as to any one material fact, the whole of his testimony must be rejected, is not of such binding effect as to authorize the court to instruct the jury, that they cannot believe one part of his statement and disbelieve another. This is but a presumption of law, and cases often occur in which jurors may yield entire credit to certain statements and disbelieve others. *Lewis v. Hodgdon*, 17 Maine, 267.

13. A witness discredited upon one point may be believed upon another point, when his evidence is supported by the circumstances and seems probable. But it is different when an allegation is supported by his evidence alone or principally; there can be no one to contradict what the witness says, if untrue, and when his statement is in effect contradicted by the attending circumstances. *Burton v. Tisdall*, 4 Barb. 571.

14. The declarations of witnesses whose testimony has been taken under a commission, made subsequent to the execution of the commission, *contradicting* or *invalidating* their testimony, are inadmissible in evidence. Such evidence is always inadmissible until the witnesses have been examined upon the point, and an opportunity furnished to them for explanation or exculpation; and the rule applies as well when the testimony is taken under a commission as otherwise. *Brown v. Kimball*, 25 Wend. 259.

15. A witness, on cross-examination, cannot be asked a

question otherwise irrelevant, for the purpose of testing his moral sense. *Commonwealth v. Shaw*, 4 Cush. 593.

16. When a witness is called to impeach the character for truth and veracity of a witness called by the other side, such impeaching witness can only speak of the general reputation in the community of the witness sought to be impeached, and cannot give his own opinion of character. *Bucklin v. The State*, 20 Ohio, 18.

17. The proper question to be put to such witness is, as to the general reputation of the witness sought to be impeached for truth and veracity, and not what his character for truth and veracity is. *Ib.*

18. The evidence of general bad character of a witness should not be confined to the single fact of want of veracity on oath. *Day v. The State*, 13 Mis. 422.

19. Where a document is offered to contradict a witness, it must be first identified as the one referred to by him. *West v. The State*, N. J. 212.

20. Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general and almost universal rule, inadmissible. It seems, however, that to this rule there are exceptions, and that under special circumstances such proof will be received; as when the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction, given by the witness, is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen. *Robb v. Hackley*, 23 Wend. 50.

21. When the credit of a witness has been impeached by proof that in a certain conversation he had made statements inconsistent with the truth of his testimony, he may, on his re-examination, be asked and may state what that conversation was to which the impeaching witness referred. *The State v. Winkely*, 14 N. H. 480.

22. When a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness consistent with his testimony on the trial. *State v. Dover*, 10 N. C. 469.

23. Where it is sought to discredit a witness by showing that he had formerly testified differently from what he had sworn to at the trial, confirmatory evidence of his testimony may be introduced, and the witness himself may be examined to confirm his own testimony. *The State v. George*, 8 Ired. 324.

24. Where the cross-examination of the principal witness for the people, in a criminal case, was conducted in a manner tending to impair her credibility, and to show that the prosecution was the result of a conspiracy in which she was concerned, it was held, that it was competent to sustain the witness by showing that another person, to whom the facts had become professionally known, wrote to the public authorities, and was the cause of the prosecution being instituted. *Lohman v. People*, 1 Comst. 379.

25. A party calling a witness as to character is confined to general questions, but the opposite party may ask particulars. *People v. De Graff*, 1 Wheeler's C. C. 205.

26. Before the credit of a witness can be impeached by proof of any thing which he has said in relation to the cause, a foundation must be first laid by such proof, by first asking him whether he has said that which is intended to be proved. *Clementine v. The State*, 14 Mis. 112.

27. Where a witness is impeached for previous bad character, evidence of statements made before trial, consistent with those made at the trial, may be given in his support. The order of questions to be put to impeaching witnesses is not established by the rules of evidence. *The State v. Dove*, 10 Ired. 469.

28. The character for veracity of a female witness cannot be impeached by evidence of her general character for chastity. *Commonwealth v. Moore*, 3 Pick. 194.

29. Where, on indictment for an assault with intent to commit a rape, the prosecutrix was cross-examined as to crimes committed by her several years before the alleged

offence, it was held, that evidence might be adduced to show that her character had since been good. 2 Stark. 241.

30. The proper question to be put to a witness called to impeach another, is whether he would believe him on oath. The opposite party may then go into a cross-examination to ascertain the ground of the unfavorable opinion, the means of knowledge of the character of the witness impeached, and the source, extent and duration of the unfavorable reports. 4 Wend. 231.

31. The court will instruct him, however, to enable him to determine; and if the answer form one link in a chain of testimony against him, he is not bound to answer. 4 Wend. 231.

32. If the court thinks the answer *may* in any way criminate the witness, it should allow his privilege, without exacting from him to explain *how* he would be criminated by the answer, which the truth may oblige him to give *It*.

33. The statute allowing the relative of a person killed to recover damages therefor, it will be no impeachment of a witness, that he, as father of the deceased, had attempted by negotiation to recover compensation from the author of the death. *The People v. Austin*, Parker's Cr. 154.

34. An attesting witness is the witness of the law, and may be discredited by any one who examines him. 7 Cowen, 238.

35. When it is intended to bring the credit of a witness into question by proof of any thing which he may have said or declared touching the cause, the usual practice is first to ask him, upon cross-examination, whether or not he has said or declared that which is intended to be proved in contradiction to him. And it is not enough to ask him *generally* whether he has ever made such a statement, but particulars must be specified to him. 1 Moo. & Mal. 473.

36. Evidence that a witness has, on previous occasions, given the same relation of facts to which he testifies on the trial, is admissible, where the witness is impeached either by adversary testimony or upon cross-examination, or even upon direct examination, as where he admits that he was an ac-

complice in the crime of which he proves another to have been guilty. 12 Wend. 78.

37. So where the witness is sought to be impeached, on the ground of inconsistent relations of the matter in question, his *examination* as a witness, taken on the arrest of a criminal, is admissible in evidence in support of his testimony 19 Wend. 569.

38. On the trial of a person charged with *rape*, or *an assault with intent*, &c., the prosecutrix may be shown to be in fact a common prostitute. And the prisoner is not restricted to proof of her general character for *truth and veracity*, but may give evidence of her *general moral character*. 19 Wend. 570.

(f.) *Infamy.*

1. It is the nature of the crime, and not the punishment, which determines whether a convict is an admissible witness. A conviction of treason, felony, or any of the *crimen falsi*, renders the witness incompetent. *People v. Whipple*, 9 Cowen, 707.

2. It is no objection to the competency of a witness that he has been convicted of an assault and battery, with intent to commit murder, and has been sentenced to fine and imprisonment. *United States v. Brockins*, 3 Wash. C. C. 99.

3. A person convicted of forgery, or other infamous crime, in one state, was held incompetent in another, within the provisions of the constitution of the United States and the act of congress declaring the effect of the records of one state in every other. *State v. Candler*, 3 Hawks, 393.

4. The conviction for an infamous crime cannot be proved by the witness on his *voir dire*, he not being bound to answer; nor would his answer be the best evidence of which the case is susceptible. *People v. Herrick*, 13 Johns. 82.

5. Where a prisoner had been pardoned on condition of leaving the state for a specified time, and the condition was not complied with, the court, after the expiration of the time,

held the pardon to be void, and passed sentence. *State v. Fuller*, 1 M'Cord, 178.

6. Conviction of keeping a bawdy-house goes to the credibility only, and not to the competency of a witness. *Deer v. The State*, 14 Mis. 348.

7. A conviction for libel in another state does not disqualify a witness in Alabama, nor is the record of conviction admissible in evidence to discredit him. *Campbell v. The State*, 23 Ala. 44.

8. A person convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not a competent witness. *Commonwealth v. Rogers*, 7 Met. 500.

9. Where a witness becomes incompetent from infamy, had, before conviction, attested any instrument, his handwriting might be proved in the same manner as if he were dead. *Jones v. Mason*, 1 Stra. 883.

10. Objection to competency on the ground of infamy, must be taken before the witness is sworn. *People v. M'Garren*, 17 Wend. 460.

11. A person convicted of perjury is an incompetent witness, though he has been pardoned by the governor, and the pardon purports to restore him to all his civil rights, the legislature having provided that such convict shall not be received as a witness till such judgment be reversed; such is the law, though the exclusive power of pardon be vested in the governor. *Houghtaling v. Kelderhouse*, Parker's Cr. 241.

12. Such incapacity to testify is the result of a rule of evidence, and not a punishment of the offence. *Id.*

13. Where a defendant proves the making of an admission by the plaintiff, the latter has a right to give evidence in explanation of the admission, and to have the witness to state all that was said upon the subject at that time. *Id.*

(g.) *Interest.*

1. In an indictment for uttering a forged note, the person whose name is forged may testify to facts going to prove the *scienter*. *Coe's Case*, 1 Rogers' Rec. 141.

2. On the trial of an indictment for forgery, the party, whose signature is alleged to be forged, is a competent witness to prove the forgery, and also the destruction of the instrument alleged to be forged, although civil actions are pending against him, to which his only defence may be the forgery of said instrument. *Commonwealth v. Peck*, 1 Met. 428.

3. The party whose name is alleged to have been forged is a competent witness upon the trial under an indictment for forgery. *State v. Shurtliff*, 18 Maine, 368; *Contra, State v. Stanton*, 1 Ired. 424.

4. On the trial of an indictment for perjury, the commonwealth offers as a witness a person against whom a civil action is pending, wherein the defendant in the indictment has been summoned as a witness for the opposite party, held, the witness so offered for the commonwealth has no such interest in the prosecution as renders him incompetent to testify. *The Commonwealth v. Hait*, 2 Rob. Virg. 818.

5. Upon the trial of an indictment for larceny, the party injured is not a competent witness for the prosecution, if he is entitled to treble the value of the property stolen upon the conviction of the prisoner. *The State v. Pray*, 14 N. H. 464.

6. In a criminal prosecution under the Revised Statutes of Maine, c. 162, § 13, for willfully destroying property, the party injured may be a witness for the state. *The State v. Pike*, 33 Maine, (3 Red.) 361.

7. Inhabitants of a town to which the law appropriates a penalty which may be recovered in a criminal case, are not therefore incompetent witnesses for the state in such case. *The State v. Woodward*, 34 Maine, (4 Red.) 293.

(h.) *Number of Witnesses.*

1. The failure of the legislature to invest the courts of original criminal jurisdiction with power to coerce the attendance of witnesses, residing within the state, beyond the limits of their respective territorial jurisdictions, cannot deprive the accused of his right, under the constitution, art. 6, § 18, of having his witnesses heard, whether found within or beyond such limits. *State v. Hornsby*, 8 R. 554.

2. As the right of being confronted with the witnesses against him is a personal privilege, which the accused may waive, and as he is entitled to a speedy trial, he may require the testimony of witnesses in his favor, residing within the state, but beyond the jurisdiction of the court, to be taken under commission. *Ib.*

3. It does not appear anywhere to be laid down that two witnesses are necessary to disprove directly the fact sworn to by the defendant, although, in addition to the testimony of a single witness, some other independent evidence ought to be adduced. The falsity of the oath was directly proved by one witness, who swore that the prisoner gave him the sifter; and the evidence given by the other four witnesses appears to be of that independent and supplemental character which will satisfy the rule of law. *State v. Molier*, 1 Dev. 263.

4. That the witness indicted took the oath, and the terms of the oath may be proved like any other fact, by the uncorroborated testimony of a single witness. *State v. Hayward*, 1 Nott & M'Cord, 649.

(i.) *Opinions of Witnesses.*

1. It is not competent for a witness to give his opinion as to how a person looked on a particular time, as that he looked serious, but he should state the evidences of his mental condition, as that he was habitually lively, but on that occasion was silent, or the like. *Johnson v. The State*, 17 Ala. 618.

2. Where, in action of *crim. con.*, a witness testifies that

he saw the defendant at the plaintiff's house, in company with the wife of the latter, his opinion as to the purpose for which he was there is not admissible as evidence. *Cox v. Whitfield*, 18 Ala. 738.

3. On an indictment for homicide the prisoner justified, on the ground that the act was done in self-defence, and a witness was offered to testify that he said to the prisoner, just before the killing, "Yonder comes John Anderson, (the deceased,) and he will kill you." Held, that this testimony was inadmissible, it being the mere opinion of the witness as to the intention of the approaching person; but that he might testify that he told the prisoner of any acts or words of the party approaching, whether they were true or false. *Hudgins v. State*, 2 Kelley, 173.

4. The opinions of medical men, examined as witnesses in a prosecution for murder, as to the cause of the death, are not conclusive upon the jury. Their testimony must be weighed by the jury as other evidence. *State v. Bailey*, 4 An. 376.

5. The opinion of a physician upon a question not involving medical skill or science is not admissible evidence. *Woodin v. The People*, Parker's Cr. 464.

6. Medical men are allowed to give their opinions in cases of alleged insanity, because they are supposed, by their study and practice, to understand the symptoms of insanity, and to possess peculiar knowledge on that subject, without which the jury could not be able to decide the question correctly; but they should not be permitted to express such opinion, except on all the testimony which is relied on to establish insanity. *Lake v. The People*, Parker's Cr. 495.

7. A medical witness, examined as an *expert* on a question of insanity, may be asked his opinion as to a hypothetical statement of facts; he may also be asked what are the symptoms of insanity. Whether such facts exist or such symptoms be proved, it belongs exclusively to the jury to decide. *Id.*

8. A witness, who was a clerk in chancery, and who testified that he had been accustomed to examine signatures as to their being genuine, is not entitled to give an opinion as

a person skilled in detecting forgeries, whether a signature is genuine or imitated. *The People v. Spooner*, 1 Denio, 343.

9. *Experts* are not allowed to give their opinions on the case where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon. *United States v. McGlue*, 1 Curtis Ct. Ct. 1.

10. On a criminal trial, an *expert* in handwriting may testify whether, in his opinion, anonymous letters, written in a disguised hand, and calculated to divert suspicion from the defendant, are in the defendant's handwriting, and may give his reasons for his opinion. *Commonwealth v. Webster*, 5 Cush. 295.

11. On a criminal trial, an *expert* in handwriting, who has testified that, in his opinion, certain anonymous letters, written in a disguised hand, and calculated to divert suspicion from the defendant, are in the defendant's handwriting, and that some parts of them could not have been made with a pen, cannot be asked whether those marks were made with a peculiar instrument found in the defendant's possession. *Id.*

12. As to when the opinions of *experts* are evidence, and the effect of such evidence, see *State v. Clark*, 12 Ired. 151.

13. An *expert*, who has heard the whole evidence given in a cause, is incompetent to give his opinion as to the effect of such evidence. But he may give his opinion on a case hypothetically stated. *Luning v. The State*, 1 Chand. (Wis.) 178.

14. Where, on a trial, the counsel for the defendant asks a witness a question involving scientific opinions, in a matter wherein he professes skill, if it be isolated and not coupled with any other proposition, it is not proper evidence to be received. But the statements of books of science, not verified by his own experience, is of no more authority than the books themselves. The opinions given in such books are not legal evidence. *Luning v. The State*, 1 Chand. (Wis.) 264.

15. It is wholly within the discretion of the court to hear or reject the reading of scientific books, on the trial of a cause. *Id.*

16. Where insanity is set up as a defence to a criminal prosecution it is competent for a witness, whose intimacy with the prisoner and opportunities for observation have been such as to enable him to form a correct judgment of his mental condition, not only to depose to facts, but to give his opinion as to whether he was sane or not at the time of the commission of the offence. *Norris v. The State*, 16 Ala. 776.

17. A witness cannot be allowed to state that a defendant is not guilty of the offence charged; he can only state facts known to him, from which the jury can judge of the prisoner's guilt. *Garret v. The State*, 6 Mis. 1.

18. An experienced physician, after having made a *post mortem* examination of the body of a female, may, as an *expert*, offer his opinion as to whether she had been pregnant, and what was the cause of her death. *The State v. Smith*, 32 Maine, (2 Red.) 369.

19. The opinion, not only of cashiers and tellers of banks, is admissible as to the genuineness of a bank note, but also that of merchants, brokers and others who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them, and able to judge between a true and counterfeit bill, and have that knowledge, among other things, tested by the fact, that no bill, passed by the witness, has been returned, though there has been time for it, if any of them were not genuine. *The State v. Cheek*, 13 Ired. 114.

20. A witness, who is not a medical man, is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. *M'Lean v. The State*, 16 Ala. 672.

21. A witness, not skilled in the science or art touching which his opinion is asked, is incompetent to give an opinion. He can only state facts, and the jury must draw conclusions. *Luning v. The State*, 1 Ohand. (Wis.) 178.

(j.) *Privileged Communications.*

1. If a witness claims the protection of the court, on the ground that the answer would tend to criminate himself, and there then appears reasonable ground to believe that it would do so, he is not compellable to answer. *Reg. v. Garbett*, 1 Dev. C. C. 236.

2. If compelled notwithstanding, what he says after such claim must be considered as obtained by compulsion, and cannot be given in evidence against him. *Ib.*

3. He is entitled to protection at whatever stage of the inquiry he chooses to claim it; and he is equally entitled to protection whether he has already answered the question or not at all. *Ib.*

4. The Secretary of State is not bound to disclose any official confidential communications. But the fact whether a commission has been in his office or not, he is bound to disclose. *Marbury v. Madison*, 1 Cranch, 142.

5. The officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the prisoner's apprehension. *The United States v. Moses*, 4 Wash. C. C. 126.

6. But a police officer will be compelled to answer at the instance of the commonwealth. *Mina's Case*, Pamph. 9.

7. In the trial of an indictment for larceny, a witness from whom the party is charged to have stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the person indicted. *State v. Saper*, 16 Maine, 293.

8. A confession made to a Roman Catholic priest is not evidence. *Smith's Case*, 1 Rogers' Rec. 77.

9. But confessions to a Protestant divine are not privileged. *Commonwealth v. Drake*, 15 Mass. 161.

10. Information collected and reduced into writing by a solicitor from a subscribed witness to a codicil is not privileged; but, *semble*, it would be otherwise if collected by the client and communicated to the solicitor. *Mackenzie v. Yeo*, 2 Curteis, 871.

11. Letters written to the principal solicitor by another solicitor, also employed by the client to collect evidence in the matter, and with directions to communicate it to the principal solicitor, held to be privileged communications. *Mackenzie v. Yeo*, 2 Curteis, 875.

12. Letters written by a defendant after the commencement of a suit to an unprofessional agent abroad, but "confidentially and in reference to the defence," &c., held not privileged. *Kerr v. Gillespie*, 7 Beav. (Ch.) 572.

13. A defendant who relies on the privilege is bound to bring himself clearly and distinctly within it. *Desborough v. Rawlins*, 3 Myln. & Cr. 515, 519.

14. A solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for his client, even though such business has no reference to legal proceedings either existing or in contemplation. *Greenhough v. Gaskell*, 1 Myln. & Cr. 98.

15. A solicitor cannot refuse to answer questions which have come to his knowledge collaterally, and not confidentially or from other quarters. *Mackenzie v. Yeo*, 2 Curteis, 868.

16. The answer to an interrogatory confined to a point on which the party's solicitor was produced is admissible, although he gained his information as solicitor. *The King's Proctor v. Daines*, 3 Hagg. (Eccl.) 235.

17. Confidential communications between attorney and client are not to be revealed at any period of time; not in an action between third persons, nor after the proceedings to which they referred are at an end, nor after the dismissal of the attorney. The privilege of not being examined to such points as have been communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney, and it never ceases. *Mackenzie v. Yeo*, 2 Curteis, 867.

18. Where an attorney is obliged to employ an agent to collect evidence in support of legal proceedings, communications of such agent to his employer, relating thereto, are privileged. *Steele v. Stewart*, 1 Phil. (Ch.) 471; 13 Sim. 533.

19. Where an attorney directly or immediately derives information from his client, that is a privileged communication; but the matters communicated must have come directly or immediately from the client; for if the facts come collaterally from another person, the attorney will be bound to answer. *Mackenzie v. Yeo*, 2 Curteis, 870; *Loyd v. Loyd*, 2 Curteis, 263.

20. Declarations made by a party in the cause to a solicitor whom the party had at the time requested to act on his behalf as his solicitor, rejected as privileged communications. Article of an allegation pleading same rejected accordingly. *Smith v. Fell*, 2 Curteis, 667.

21. Where the clerk of the plaintiff's attorney called upon the defendant for the purpose of obtaining a compromise, held, that what passed was privileged. *Jardine v. Sheridan*, 2 Carr. & K. 24.

22. Letters written by the testator to his solicitor, with regard to a bond executed by the testator in favor of the party propounding the codicil, held not to be privileged communications as between the solicitor and the executor opposing the codicil, by whom he was also employed as his solicitor in the matter; and that, if they were so, the privilege had been waived, the witness having been produced to state what passed on the instructions for the preparation, &c., of the bond, and the adverse party being entitled to cross-examine a witness as to all facts on which he has been examined. *Mackenzie v. Yeo*, 2 Curteis, 875.

(k.) *Want of Religion.*

1. A person believing in the being of a God, and in his attributes as a righteous avenger of wickedness and in the existence of a future state, is competent to be sworn as a witness. *The Commonwealth v. Batchelder*, Thacher's Crim. Cas. 191.

2. After the incompetency of a witness, on account of a defect in religious belief, has been established by testimony, he cannot be sworn upon the *voir dire*, to restore his compe-

tency by his own declarations. *The Commonwealth v. Wyman*, Thacher's Crim. Cas. 432.

3. Upon objection to a witness for defect of religious faith, he stated at first that he believed in a God; and afterwards, that he did not consider an oath more binding upon his conscience than a simple promise; that he attached no religious obligation or sancity to an oath, and that he had no idea of a God, who knows the secrets of all hearts, and who rewards and punishes men according to their conduct. Held, that such witness was incompetent. *The Commonwealth v. Barnard*, Thacher's Crim. Cas. 431.

4. If an objection is taken to a witness on account of his religious sentiments, such sentiments should be proved by other witnesses. *The Commonwealth v. Batchelder*, Thacher's Crim. Cas. 191.

5. A disbeliever in the existence of a Supreme Being, who will punish false swearing, is not a competent witness in New-York, but the objection must be taken before he is sworn. *The People v. M'Garren*, 17 Wend. 460.

6. The test of a witness' competency *at common law*, on the ground of his religious principles, is whether he believes in the existence of a God, who will punish him if he swears falsely. *Butts v. Smartwood*, 2 Cowen, 431.

7. Persons who do not believe in the obligation of an oath, and a future state of rewards and punishments, are incompetent witnesses. *Wakefield v. Ross*, 5 Mason, 16; *State v. Cooper*, 2 Tenn. 96.

8. It is not enough to believe in God, and that men are punished in this life. [Altered in Connecticut by legislative enactment, May, 1830.] *Atwood v. Wilton*, 7 Conn. 66.

9. One's belief may be proved from his previous declarations and avowed opinions, and he cannot be admitted to explain them himself. *Norton v. Ladd*, 4 N. H. 444.

10. One who does not believe in the existence of a God is not a competent witness, and the fact may be established by the testimony of other witnesses. *Thurston v. Whitney*, 2 Cush. 104.

11. Any person who believes in the existence of a God or Supreme Being, who is the just moral governor of the Uni-

verse; who will, either in this life or the next, reward virtue and punish vice, and who feels that an oath will be binding upon his conscience, cannot be excluded from giving his testimony on the ground of his religious belief. *Arnold v. Arnold*, 13 Vt. 362.

12. The true test of a witness' competency, on the ground of his religious principles, is whether he believes in the existence of a God, who will punish him if he swears falsely; and within this rule are comprehended those who believe future punishments not to be eternal. *Cubbison v. M'Creary*, 2 Watts & Serg. 262.

13. One who believes in the existence of God, and that an oath is binding on the conscience, is a competent witness, though he does not believe in a future state of rewards and punishments. *Brock v. Milligan*, 10 Ohio, 121.

14. A person who believes that there is no God is not a competent witness. To prove this, it is competent to show his settled and previous declarations on the subject. Though the witness may have been, for this reason, incompetent, yet if the objection has been removed by a change of views, he should be examined. *Scott v. Hooper*, 14 Vt. 535.

15. The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being. *Smith v. Coffin*, 18 Maine, 157.

16. Although, after the proof of such declarations, an honest change of opinion may be shown, and the proposed witness thereby rendered competent, yet the testimony of another person, that the witness offered was then, and for many years next preceding had been a Universalist, and was an active member of a Universalist society, and has ever been and then was a firm believer in the Christian religion, was held to be inadmissible. *Ib.*

17. When declarations of disbelief are proved, the person offered as a witness cannot be permitted to testify to his belief in a Supreme Being, in order to qualify himself for admission. *Ib.*

18. To show a witness incompetent from a defect of religious belief, his conversation or declarations on religious topics are admissible. *Bartholemey v. The People*, 2 Hill, 249.

(1.) *Want of Understanding.*

1. There is no particular age at which a witness must have arrived to render him competent to testify; if he appear, on examination by the court, to have a sufficient sense of the wickedness of false swearing, he may be sworn, although of never so tender an age, and the jury are to judge of his credit. *Commonwealth v. Hutchinson*, 10 Mass. 225.

2. If a witness be fourteen years of age, he is not interrogated respecting his capacity, but is presumed to have sufficient knowledge and discretion to be sworn, unless some circumstances creating suspicion be shown. *State v. Doherty*, 2 Tenn. 80.

3. A child only four years old cannot have that idea of a future state which would make it a competent witness. *Rea v. Pike*, 3 Carr. & Payne, 598.

4. Persons of color are competent witnesses; they are presumed to be free. *State v. Levy*, 5 An. 64.

5. A person *deaf* and *dumb* from his birth, and who understands the meaning of signs, and has a due sense of moral obligation, may be examined; and a person accustomed to converse with him may be sworn to interpret the tokens he uses in his replies. 8 Conn. 98.

6. A person in a state of intoxication is inadmissible, on the ground of a want of discretion. 15 Serg. & Rawle, 235.

7. An infant of any age may be a witness, if he appears sufficiently to understand the nature and moral obligation of an oath; for the competency of infants depends not so much upon age as understanding. Arch. Cr. Pl. 144.

8. The testimony of an infant of seven years, corroborated by circumstances, was held sufficient to justify a conviction for a rape. *State v. Le Blanc*, 1 Const. 354.

9. A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements is to be submitted to the consideration of the jury, who should regard the age, the understanding and the sense of accountability for moral conduct in coming to their conclusion. *State v. Whittier*, 21 Maine, 341.

(m.) *What Witness may Refuse to Answer.*

1. The rule that a witness is not obliged to criminate himself is well established. But this is a privilege which may be waived; and if the witness consents to testify in one matter tending to criminate himself, he must testify in all respects relating to that matter, so far as material to the issue. If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue. *Low v. Mitchell*, 18 Maine, 372.

2. A witness is not bound to testify to any matter which will tend, in any manner, to show him guilty of a crime, or liable to a penalty. *Chamberlain v. Wilson*, 12 Vt. 491.

3. If the witness understandingly waive his privilege, and begin to testify, he must admit to a full cross-examination, if required. The witness must first determine whether he will claim the privilege; and if the privilege is claimed upon oath, the court cannot deny it, unless fully satisfied that the witness is mistaken, or acts in bad faith. *The State v. R.*, 4 N. H. 562.

4. A witness is not bound to give answers which may stigmatize or disgrace him. *State v. Bailey*, 1 Pennington, 415; *Baird v. Cochran*, 4 Serg. & Rawle, 400; *Resp. v. Gibbs*, 3 Yeates, 429, 437; *People v. Herrick*, 13 Johns. 82.

5. A witness is not bound to answer any questions which may impeach his conduct as a public officer. *Jackson v. Humphrey*, 1 Johns. 498; *Marbury v. Madison*, 1 Cranch, 144.

6. A witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. 4 Wash. C. C. 729.

7. It is not necessary, in order to render the question objectionable, that it should directly criminate the witness. It is sufficient if it has a tendency to do so. 3 Taunt. 424.

8. The witness, and not the court, is the proper judge whether a question put to him has a tendency to criminate.

The court will instruct him to enable him to determine, and if the answer form one link in a chain of testimony against him, he is not bound to answer. *State v. Edwards*, 2 Nott & M'Cord, 13.

9. It is the province of the court to judge whether any direct answer to the questions which may be proposed, will furnish evidence against the prisoner. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case, the witness must himself judge what his answer will be, and if he say on oath he cannot answer without accusing himself, he cannot be compelled to answer. 1 Burr's Trial, 245; *Parkhurst v. Lowton*, 2 Swanst. 215.

10. The witness (with the instruction of the court when necessary) must decide when his answer will tend to criminate him, and his decision is upon oath, and at the peril of perjury. *Poole v. Perritt*, 1 Spears, 128.

11. A witness may be compelled to answer, although he declare that he cannot do so with safety to himself, if the question appear to the court to be one, the answer to which cannot possibly criminate him. *Territory v. Nugent*, 1 M. 108.

12. A witness is not bound to answer a question, the answer to which must inevitably criminate himself. *Richman v. The State*, 2 Greene, (Iowa,) 532.

13. It is not for the witness, but for the court, to determine whether the answer to a proposed question must inevitably tend to criminate the witness. *Ib.*

14. It makes no difference, in the right of the witness to protection, that he had before answered in part, as he is entitled to claim the privilege at any stage of the inquiry; and no answer forced from him by the presiding judge, after such a claim, can be afterwards given in evidence against him. *Queen v. Garbett*, 2 Car. & K. 474.

15. The privilege of objecting to a question tending to subject the witness to penalties or punishment, belongs to the witness only, and ought not to be taken by counsel, who will not be allowed to argue it. 6 Cowen, 254.

16. The exemption only extends to answers as to that class of offences for which the witness is *yet liable to be punished*. If the offence be barred by the statute of limitations, the privilege is gone, and the only remaining question of privilege is brought to depend upon the question whether there was moral turpitude in the offence, and how far the witness shall be privileged from answering in that view. 4 Wend. 229, 252.

17. If the witness begins to answer he must proceed. Thus, where the witness, after having answered one or two questions, on being further pressed, appealed to the court for protection, ABBOTT, C. J., said: "You might have refused to answer at all, but having partially answered, you are now bound to give the whole truth." Moo. & Mal. 47.

18. If the witness voluntarily state a fact, he is bound to state how he knows it, though it criminate him. 4 N. H. 562.

19. Where a witness is asked a question, the answer to which would disgrace him, but could have no bearing upon the issue, except as it might impair his credibility, he is privileged from answering. *Lohman v. People*, 1 Comst. 379.

20. A witness is not ordinarily bound to testify to his own infamy; but if he does so, for the purpose of fixing crime upon another, he cannot claim the privilege, when asked questions, the answers to which may weaken his former testimony or remove its weight entirely. *People v. Lohman*, 2 Barb. Sup. Ct. 216.

21. But in such case the party putting the question, the answer to which may tend to degrade the witness, must show affirmatively that the question is relevant. *Ib.*

22. A witness is not obliged to answer a question which would show his character to be infamous. *United States v. Dickinson*, 2 M'Lean, 325.

23. Or which, in his own judgment, might expose him to a prosecution for a crime or misdemeanor. *The People v. Rector*, 19 Wend. 569.

24. Or will tend to degrade his moral character. *Ib.*

25. It is the province of the court to judge whether a direct answer to a question may tend to criminate a witness.

The Commonwealth v. Braynard, Thacher's Crim. Cas. 146.

26. In the trial of an indictment for larceny, a witness, from whom the property is charged to have been stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the persons indicted. *The State v. Soper*, 4 Shep. 293.

27. A witness on a trial cannot be asked if he has not, in conversation, stated the facts otherwise than as he now deposes. *The State v. Simpson*, 2 Hawks, 580.

28. But in such case, neither the court nor a party can object, where the witness does not. *The People v. Bodine*, 1 Denio, 281.

29. Not only is a witness excused from answering a question which will expose him to punishment or a criminal prosecution, but when the direct answer to a question will *disgrace* the witness and fix a stain of infamy upon his character, he is not bound to answer; and that whether the question be material or not to the merits of the cause in which he is examined. 4 Serg. & Rawle, 400.

30. It is not enough, however, for the witness to allege that his answer will have a *tendency* to expose him to infamy or disgrace. The question must be such that the answer to it will *directly* show his infamy, and they must see that such will be the case before they will allow the excuse to prevail. 4 Wend. 232.

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| Code Reports, N. S., | 1 " | Wheeler's Criminal Cases, | 3 " |
| Coleman and Caines' Cases, | 1 " | | |

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